# NOTES

## A REDEFINITION OF JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS*

STATUTORY procedures for judicial review of federal regulatory agencies have been enacted with a double purpose: to permit expedient administrative action and to confine it within the alembic of the Constitution.[1] Complementing this balance of objectives are the principles adopted by the courts that administrative remedies must be exhausted before a petition for review will be granted,[2] and that review may not be had at all until a "final" order has been issued.[3] The apparent tendency of the judiciary, moreover, has been to enlarge greatly the categories of non-reviewable orders;[4] and as a result, courts, forced by "hard cases", have attempted to escape the strictures of an inordinate nomenclature by indicating the availability of an extra-statutory equity jurisdiction to review "non-reviewable" orders.[5] Recently, however, the Supreme Court promulgated a clarified rule of judicial review[6] which went far toward clearing away many of the superficial distinctions which long had fettered its application.[7]

The rationale of non-reviewability is easily discernible. Preliminary issues may disappear in the course of administrative procedure; and by delaying judicial review until some final determinative action has been taken by a commission, the court has fewer and more precisely defined questions to

* Rochester Telephone Corp. v. United States, U. S. Sup. Ct. (1939), 6 U. S. L. WEEK 1133.

1. See McGuire, *Judicial Reviews of Administrative Decisions* (1938) 26 GEO. L. J. 574, 586. For typical statutory procedures, see 52 STAT. 112, 15 U. S. C. § 45 (c) (Supp. 1938); 48 STAT. 901, 15 U. S. C. § 78 y (a) (1934); 50 STAT. 85, 15 U. S. C. § 836(b) (Supp. 1937); 49 STAT. 860 (1935), 16 U. S. C. § 825 1 (Supp. 1938); 38 STAT. 219, 220 (1913), 28 U. S. C. §§ 41 (28), 46, 47 (1934); 49 STAT. 455 (1935), 29 U. S. C. § 160 (f) (Supp. 1938); 48 STAT. 1093 (1934), 47 U. S. C. § 402 (Supp. 1938).

2. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50 (1938); Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981; Note (1927) 27 COL. L. REV. 450.

3. Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 385 (1938). See Comment (1938) 47 YALE L. J. 766.

4. See American Federation of Labor v. National Labor Relations Board, App. D. C. (1939) 4 L. R. R. 34, 35.

5. Shields v. Utah Idaho Central R. R., 59 S. Ct. 160 (U. S. 1938); Utah Fuel Co. v. National Bituminous Coal Commission, 59 S. Ct. 409 (U. S. 1939); American Federation of Labor v. National Labor Relations Board, App. D. C. (1939) 4 L. R. R. 34.

6. Rochester Telephone Corp. v. United States, U. S. Sup. Ct. (1939), 6 U. S. L. WEEK 1133.

7. The "affirmative" and "negative" order doctrine, for example, was first expounded in 1912. Proctor & Gamble Co. v. United States, 225 U. S. 282 (1912).

consider.[8] In this respect the purpose is not unlike that of the final judgment rule in the judicial process.[9] Erroneous preliminary orders are susceptible of correction by the administrative body at hearings provided by statute.[10] Moreover those orders which must be enforced through the courts will receive an early judicial determination in any event; and review of intermediate orders may be deferred until the review of the ultimate order.[11] A final and very persuasive argument for non-reviewability is that administrative bodies ought to be permitted a full opportunity to resolve the technical problems before them prior to judicial interference.[12]

While the rationale and policy of reviewability are clear, the categories of reviewable orders, previous to the decision in the instant case[13] were neither clear nor purposive.[14] Form and substance had been used alternately as tests.[15] Finality and enforceability of the order became merely some indicia.[16] Among the types of orders held non-reviewable were those denying exemption from statutory obligations;[17] those enforceable by the Attorney-General at his dis-

8. United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 311 (1927). United States v. Griffin, 303 U. S. 226, 233 (1938); State v. Superior Court, 87 P. (2d) 294, 296 (Wash. 1939); McGuire, *supra* note 1 at 580; Comment (1938) 47 YALE L. J. 766, 769, 772.

9. See Crick, *The Final Judgment as a Basis for Appeal* (1932) 41 YALE L. J. 539.

10. See United States v. Illinois Central R. R., 291 U. S. 457, 463 (1934); Carolina Aluminum Co. v. Federal Power Commission, 97 F. (2d) 435, 438 (C. C. A. 4th, 1938).

11. See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 48 (1938); Dupont & Co. v. Boland, 85 F. (2d) 12, 15 (C. C. A. 2d, 1936); H. R. REP. No. 1147, 74th Cong. 1st Sess. (1935) 24.

12. See United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd., 284 U. S. 474, 482 (1932); Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45, 48 (C. C. A. 8th, 1922); DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 71-73; 254; LANDIS, THE ADMINISTRATIVE PROCESS (1938) 141; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577, 600.

13. Rochester Telephone Corp. v. United States, U. S. Sup. Ct. (1939), 6 U. S. L. WEEK 1133.

14. Comment (1938) 47 YALE L. J. 766.

15. Compare Alton R. R. v. United States, 287 U. S. 229 (1932) with Proctor & Gamble Co. v. United States, 225 U. S. 282 (1912); Newport Electric Power Corp. v. Federal Power Commission, 97 F. (2d) 580 (C. C. A. 2d, 1938) with Pacific Power & Light Co. v. Federal Power Commission, 98 F. (2d) 835 (C. C. A. 9th, 1938); Powell v. United States, 300 U. S. 276 (1937) and American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 93 F. (2d) 236 (App. D. C. 1937), with Mallory Coal Co. v. National Bituminous Coal Commission, 99 F. (2d) 399 (App. D. C. 1938).

16. See Mallory Coal Co. v. National Bituminous Coal Commission, 99 F. (2d) 399, 405 (App. D. C. 1938); *cf.* United States v. Idaho, 298 U. S. 105 (1936) (order need not be enforceable to be reviewable). Compare Intermountain Rate Cases, 234 U. S. 476 (1914) with Lehigh Valley R. R. v. United States, 243 U. S. 412 (1917) and Piedmont & Northern Ry. v. United States, 280 U. S. 469 (1930).

17. Piedmont & Northern Ry. Co. v. United States, 280 U. S. 469 (1930); Newport Electric Power Corp. v. Federal Power Commission, 97 F. (2d) 580 (C. C. A. 2d, 1938).

cretion;[18] those which were deemed to be merely declarations of "status" or findings;[19] and those preliminary to further administrative action.[20] Numerous decisions indicated that administrative orders could be judicially reviewed under statutory procedure only if they were final and if they demanded or directed that a particular thing be done.[21]

Restricted by these artificial classifications, recent decisions portended an unwonted development in the availability and scope of judicial review.[22] For despite previous decisions declaring statutory appeals the only available method,[23] the Supreme Court twice conceded an equitable jurisdiction in the district courts to determine the validity of administrative orders thought to be not reviewable by appeal, and the Court of Appeals for the District of Columbia likewise suggested the availability of such equitable jurisdiction. These opinions bore startling implications: they admitted of a jurisdiction to review administrative orders in single-judge district courts, whereas Congress has established and evidently deemed advisable appellate review by circuit courts, and in some instances by three-judge district courts.[24]

18. Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927); Federal Trade Commission v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927).

19. United States v. Los Angeles & S. L. R. R., 273 U. S. 299 (1927) (valuation); Shannahan v. United States, 303 U. S. 596 (1938) (interurban character of railroad). Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938) (findings of jurisdictional facts); Carolina Aluminum Co. v. Federal Power Commission, 97 F. (2d) 435 (C. C. A. 4th, 1938) (interference by dams with navigation).

20. *Orders to file information for use in hearings*: Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375 (1938); Securities and Exchange Commission v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937). *Procedural orders:* Third Ave. Ry. v. Securities and Exchange Commission, 85 F. (2d) 914 (C. C. A. 2d, 1936); New York, O. & W. Ry. v. United States, 14 F. (2d) 850 (S. D. N. Y. 1926). *Expressions of administrative opinion:* United States v. Atlanta, B. & C. R. R., 282 U. S. 522 (1931); United States v. Donahue Bros., Inc., 59 F. (2d) 1019 (C. C. A. 8th, 1932); Ames Baldwin Wyoming Co. v. National Labor Relations Board, 73 F. (2d) 489 (C. C. A. 4th, 1934).

21. See United States v. Griffin, 303 U. S. 226, 234 (1938); Shannahan v. United States, 303 U. S. 596, 599 (1938); Shields v. Utah Idaho Central R. R., 59 S. Ct. 160, 163 (U. S. 1938); American Federation of Labor v. National Labor Relations Board, App. D. C. (1939) 4 L. R. R. 34. Compare an earlier view expressed in *The Chicago Junction* case, 264 U. S. 258, 263 (1924).

22. See cases cited *supra* note 5.

23. Various unsuccessful efforts have been made to obtain a judicial review in a manner other than by statutory appeal or statutory injunction. See, *e.g., injunction:* Sykes v. Jenny Wren Co., 78 F. (2d) 729 (App. D. C. 1935), (1936) 49 HARV. L. REV. 659; Resources Corp. International v. Securities and Exchange Commission, 24 F. Supp. 580 (D. D. C. 1938); *certiorari:* Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45 (C. C. A. 8th, 1922); Southern Transport Co. v. Interstate Commerce Commission, 61 F. (2d) 925 (App. D. C. 1932); *mandamus:* Interstate Commerce Commission v. Campbell, 289 U. S. 385 (1933); *prohibition:* United States v. Interstate Commerce Commission, 51 F. (2d) 429 (App. D. C. 1931); *quia timet:* White v. Johnson, 282 U. S. 367 (1931); *declaratory judgment:* Piedmont & Northern Ry. v. United States, 280 U. S. 469 (1930).

24. See statutes cited *supra* note 1.

In the first of these cases, *Shields v. Utah Idaho Central Railroad*,[25] the Interstate Commerce Commission had issued, pursuant to proper statutory procedure, an order declaring an electric railroad to be non-interurban and therefore subject to the Railway Labor Act,[26] rather than excepted from it, as the railroad contended.[27] The order was made upon the petition of the National Mediation Board filed in accordance with the Railway Labor Act and laid the basis for possible further action by the Board or by the United States Attorney in the enforcement of that Act; but it was binding on the Board and the railroad and contemplated no further action by the Commerce Commission. As a declaration of "status," however, such an order was not, according to a previous determination of the Supreme Court,[28] reviewable by the statutory method provided in the Urgent Deficiencies Act.[29] The issue involved in the case was one which very probably would have survived further proceedings by the administrative agency, and would have been presented in identical form to any court in which compliance by the railroad with the Act or with an order of the Mediation Board would have been sought.[30] The Supreme Court held that the district court had jurisdiction of the railroad's suit to enjoin the United States Attorney from prosecuting it for alleged violation of the Railway Labor Act; it denied a contention that the court could try *de novo*[31] the question whether the railroad was interurban; and it held that the review was limited to the question whether the Commission's determination was properly made within its delegated authority. Review under the Urgent Deficiencies Act would have been precisely the same.

In a second case, the Supreme Court accepted the view of the district court that the latter had jurisdiction in equity to review an order of the Bituminous Coal Commission, and agreed that the petitioner failed on the merits alone.[32] The Coal Commission had announced that it would reveal in public hearings certain information previously received from coal operators, pursuant to an order of the Commission, and ordered the Secretary of the Commission to

25. 59 S. Ct. 160 (U. S. 1938).

26. 48 STAT. 1185, 45 U. S. C. § 151 (1934).

27. If the railroad were excepted from the Railway Labor Act, it would be subject to the NLRA, 49 STAT. 449 (1935), 29 U. S. C. § 151 *et seq.* (Supp. 1938).

28. Shannahan v. United States, 303 U. S. 596 (1938).

29. 38 STAT. 219, 220 (1913), 28 U. S. C. §§ 41, 46, 47 (1934).

30. See Saxton Coal Mining Co. v. National Bituminous Coal Commission, 96 F. (2d) 517, 518 (App. D. C. 1938). State v. Superior Court, 87 P. (2d) 294, 296 (Wash. 1939). It has been said that the policy behind the final judgment rule is to prevent causes from coming to appellate courts in fragments and occasioning delays. See Canter, Adm'x v. American Insurance Co., 3 Peters 307, 318 (U. S. 1830). But in the situations envisaged by the text, appeals from the orders would have finally and immediately settled the controversies.

31. But legislative declarations or findings are necessarily subject to an independent judicial review upon the facts and the law whenever rights of either persons or property are involved which are protected by constitutional restrictions. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 51 (1936).

32. Utah Fuel Co. v. National Bituminous Coal Commission, 59 S. Ct. 409 (U. S. 1939).

make the information available for inspection by interested parties prior to the hearing. Petitioner claimed that the information was confidential and that the Commission was prohibited by the Act from revealing it. While some conflict had appeared as to the reviewability of this type of order,[33] it had been held in an earlier adjudication of this case that the order was not reviewable under the statutory procedure.[34] A postponement in the review of the order, however, until after some "reviewable" order were made would have rendered useless a judicial determination of the legality of the announced disclosure. This, then, was an instance in which the issue involved could not have been determined except on direct appeal from the precise order or by proceedings in equity. And it is relevant to note that the statute allowing an appeal from orders of the Coal Commission did not stipulate that the order must be a "final" one.[35]

A somewhat similar situation arose out of an order of the National Labor Relations Board that the appropriate unit for election of West Coast longshoremen representatives should comprise some two hundred employers rather than single employers. This order precluded the American Federation of Labor from representation, destroying the Union's effectiveness in a large area. On an appeal from the order by the Federation, the Circuit Court of Appeals felt compelled by Supreme Court decisions to hold the order non-reviewable, but indicated quite clearly the availability of an equitable remedy.[36] The only possible manner in which the Federation could have had the order reviewed directly by the court of appeals would have been for some employer to refuse to bargain with representatives elected in this unit, be charged with an unfair labor practice by the Board, be ordered by the Board to bargain and petition a Circuit Court for review of the latter order or be made respondent on a petition by the Board to enforce the order. Even then the Federation could come in only as intervener. While the National Labor Relations Act specifies that an appellate review will lie from "final" orders,[37] the circuit court was constrained to declare this order non-reviewable, not because it was not "final," but because nothing was demanded or directed. In fact, the court freely conceded that, with respect to the Federation, the order was "final" and that all administrative remedies had been exhausted. The Statute, therefore, apparently did not compel the decision in this instance also.

In both cases the orders involved an interpretation of administrative powers under a statute. The determinations by the commissions relating to such

33. American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 93 F. (2d) 236 (App. D. C. 1937), (1937) 51 HARV. L. REV. 159; *cf.* Third Ave. Ry. v. Securities and Exchange Commission, 85 F. (2d) 914 (C. C. A. 2d, 1936); Mallory Coal Co. v. National Bituminous Coal Commission, 99 F. (2d) 399 (App. D. C. 1938).

34. Mallory Coal Co. v. National Bituminous Coal Commission, 99 F. (2d) 399 (App. D. C. 1938).

35. 50 STAT. 85, 15 U. S. C. § 836 (b) (Supp. 1937).

36. American Federation of Labor v. National Labor Relations Board, App. D. C. (1939) 4 L. R. R. 34.

37. 49 STAT. 455 (1935), 29 U. S. C. § 160 (f) (Supp. 1938).

questions of law[38] were not as peculiarly in performance of an administrative function as findings of technical questions of fact and lay well within the judicial province.[39] Moreover, in view of the fact that the orders were deemed reviewable in equity, they were within the judicial power and direct review should have been allowed.[40] The essential fact in each case is that the Supreme Court *did* concede that a single-judge district court did have jurisdiction to review these orders of administrative commissions.[41] Yet the normal courts of review prescribed by statute are the Circuit Courts of Appeals. One consequence of these holdings may be the further delay occasioned by the possibility of an additional judicial appeal through the circuit courts to the Supreme Court rather than the possible single appeal to the Supreme Court under statutory procedures.[42] Reasons of finality and expedition would seem to militate in favor of an early judicial review under statutory procedure in these types of cases. Another consequence is to route to the district courts sporadic cases in a field otherwise exclusively occupied by the circuit courts and beyond the experience of the district courts.

Such decisions were obviously an excrescence resulting from judicially imposed obstructions to a rational doctrine of reviewability. The logical but revolutionary consequence was a redefinition of the standards of reviewability; and in the *Rochester* case the Supreme Court, through Mr. Justice Frankfurter, initiated this process. The affirmative or negative nature of an order was declared to be no longer "useful" as a "touchstone" of jurisdiction.

38. There has been much discussion as to the feasibility of a distinction in methods of review accordingly as the issues relate to law or fact. See LANDIS, THE ADMINISTRATIVE PROCESS (1938) 146; FREUND, Historical Survey in GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923) 32; Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 564. For a discussion of administrative determinations of jurisdictional facts see Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055.

39. See Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285, 290 (1922); United States v. Idaho, 298 U. S. 105, 109 (1936). Where the question involved is purely legal it has been held unnecessary to exhaust the administrative remedy first. See Gully v. Interstate Natural Gas Co., 82 F. (2d) 145, 147-148 (C. C. A. 5th, 1936).

40. The frequent use of equity jurisdiction in federal courts to enjoin orders and requirements of state administrative bodies does not indicate the wisdom of equitable proceedings to review the orders of federal agencies. For, in regard to the state bodies there would be in many cases no federal remedy at all except in the equity courts. Di Giovanni v. Camden Fire Insurance Ass'n, 296 U. S. 64 (1935); see Petroleum Exploration, Inc. v. Public Service Commission, 304 U. S. 209, 217 (1938); (1934) 33 MICH. L. REV. 118.

41. Congress has clearly placed the jurisdiction to review in the circuit courts or in specially constituted district courts. See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 48 (1938). Some of the statutes providing for review in the circuit courts read, "Such court shall have exclusive jurisdiction." See 48 STAT. 901, 15 U. S. C. § 78 y (a) (1934); 50 STAT. 86, 15 U. S. C. § 836 (b) (Supp. 1937); 49 STAT. 860 (1935), 16 U. S. C. § 825 1 (b) (Supp. 1938); 49 STAT. 455 (1935), 29 U. S. C. § 160 (f) (Supp. 1938); Resources Corp. International v. Securities and Exchange Commission, 24 F. Supp. 580, 581 (D. C. C. 1938).

42. See statutes cited *supra* note 1.

In substitution of such criteria, the Court found considerations of policy to be completely satisfied by the requirements that technical matters pertaining to the function of an administrative body must first be determined by it, and that only questions affecting constitutional power, statutory authority or the basic prerequisites of proof could be raised at all.[43] Other standards were not so clearly defined, but it was indicated that the order must be such that any judgment rendered would be a final basis of action as between commission and party seeking review.[44]

Although the opinion seemingly attempted to escape the strictures of classification, it did indicate three general categories into which prior decisions under the "negative order doctrine" fell. The first group was stated to be that of non-reviewable orders and included those which would have the effect of forbidding or compelling conduct only on the contingency of some further action by the commission. Valuations were listed as an example.[45] The definition was also expressly made to include the order of the Interstate Commerce Commission at issue in the *Shields* case.[46] However, it would seem that the case may well fall more properly in the second group defined as reviewable. This group includes those orders declining to relieve the complainant from a statutory command forbidding or compelling conduct on his part.[47] Plainly in the *Shields* case the complainant preferred to be subject to the National Labor Relations Act rather than the Railway Labor Act, and the order of the Interstate Commerce Commission was in effect a denial of exemption from the Railway Labor Act. Moreover, by casting doubt on the validity of the determination in the *Piedmont & Northern Railroad* case,[48] involving a similar declaration of non-interurban character, the Court would now seem to be amenable to reviewability of like orders.

The precise holding on the facts of the *Rochester* case lends support to this conclusion. For the order there complained of was made by the Federal Communications Commission in determining that a telephone corporation was engaged in interstate commerce through physical connection with the facilities of another carrier controlling it or controlled in common with it. As a result

43. For a discussion of the scope of judicial review of administrative orders see Cooper, *Administrative Justice and The Role of Discretion* (1938) 47 YALE L. J. 577.

44. This would seem to be satisfied by the requirements for the exercise of the judicial power that there be a "case or controversy." United States v. Muskrat, 219 U. S. 346 (1911).

45. Delaware & Hudson Co. v. United States, 266 U. S. 438 (1925); United States v. Los Angeles & S. L. R. R., 273 U. S. 299 (1927).

46. United States v. Los Angeles & S. L. R. R., 273 U. S. 299 (1927).

47. Orders denying authority to act under the terms of a statute followed by legal consequences, [Lehigh Valley R. R. v. United States, 243 U. S. 412 (1917)] and orders denying exemption from the terms of a statute [Intermountain Rate Cases, 234 U. S. 476 (1914)] were given as examples.

48. Piedmont & Northern R. R. v. United States, 280 U. S. 469 (1930). The Court expressly overruled Lehigh Valley R. R. v. United States, 243 U. S. 412 (1917) in which the Commerce Commission had issued an order denying petitioner relief from certain statutory requirements, but it only criticized the ruling of the Piedmont case. See Rochester Telephone Corp. v. United States, U. S. Sup. Ct. (1939), 6 U. S. L. WEEK 1133, 1135 n. 11, 12.

of this finding the corporation was made subject to the mandatory orders of the Communications Commission addressed generally to carriers within its jurisdiction. Whether the latter fact was necessary to a declaration of reviewability is not clear from the opinion, but in the *Shields* case the order likewise subjected the railway to duties imposed by the Railway Labor Act and the railroad would be liable for disobedience without further action by the Board.[49] This second group, therefore, which includes both orders denying authority to act within the terms of a statute and orders denying exemption from the obligations of a statute may reasonably be subject to further enlargement.

While it is dangerous practice to speculate as to the precise group in which particular orders fall, it may be ventured that an order like that in the *Bituminous Coal Commission* case likewise comes within this group, rather than within the procedural orders or preliminary findings of Group I. For the disclosure of secret information in that case came after an administrative determination of authority under a particular statutory provision and, as already pointed out, the issue had elements of complete finality.

The third group defined by the Court includes those which refuse to compel or forbid conduct by a third party. By placing this group within the field of reviewable orders, the Court expressly overruled its 1912 determination in *Proctor & Gamble v. United States*.[50] There an order which denied a recovery of demurrage from certain railroads and which refused to set aside administrative rules allowing demurrage charges was held non-reviewable. In commenting on that case, the present Court stated that an order no longer need be one enforceable by the administrative agency to be reviewable. Issues, therefore, like those arising in the *American Federation of Labor* case would clearly seem to be embraced within this group. The order there complained of also refused to compel certain conduct by third parties, the employers, and essential elements of finality were existent.

The precise effect of Mr. Justice Frankfurter's opinion in the *Rochester* case cannot be presently evaluated, for a decision exploding long-established criteria and setting forth on a new course presents but a hint of what may lie ahead. The opinion does, however, permit further redefinition of reviewable orders in accordance with rational basic concepts concerning the relation between courts and administrative tribunals; and it provides a flexibility in judicial review of administrative orders which may well prevent the resort to multifarious, extra-statutory escapes arising from a rigid classification of reviewable orders.[51]

49. 48 STAT. 1186, 45 U. S. C. § 152 (1934).

50. 225 U. S. 282 (1912).

51. The final judgment rule in the judicial process has likewise been subject to strict classification with the unwanted result of forcing many reviews through various forms of extraordinary writs. See Crick, *The Final Judgment as a Basis for Appeal* (1932) 41 YALE L. J. 539, 553.

# BACK PAY ORDERS UNDER THE NATIONAL LABOR RELATIONS ACT*

TO EFFECTUATE the policies of the National Labor Relations Act,[1] the Labor Board is empowered to order reinstatement, with or without back pay, of employees who have been victims of unfair labor practices.[2] The Supreme Court's recent denial of *certiorari* in the *Carlisle Lumber* case left the employer with a liability for back pay under a Board order amounting to more than $200,000.[3] To burden an employer with payment of so large a sum in back wages because of a statutory violation may seem, at first blush, an unduly severe penalty. But in this particular case the unusual amount merely dramatizes a recurrent problem. The fairness of any award cannot properly be appraised without a thorough consideration of the function of the back pay order.

The back pay provision is doubtless intended, in part, to have a deterrent function — to discourage employers from engaging in unfair labor practices by requiring them to make good the losses which their violations of the law have caused.[4] Primarily, however, the Board is seeking a remedy for the conditions created by unfair labor practices; that the order may involve on the one hand punishment for the employer, or on the other, compensation for the employee, is not in itself a motivating factor, but merely a consequence incidental to the ideal of carrying out the purposes of the Act.[5] Since

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1. 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1938). In § 1, it is declared to be the policy of the United States to eliminate obstructions to commerce caused by labor disputes by encouraging and protecting the practice of collective bargaining, and guaranteeing workers full freedom of association and designation of representatives of their own choosing.

2. Section 10(c). Upon finding an unfair labor practice, the Board is empowered, *inter alia*, ". . . to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

3. N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533 (C. C. A. 9th, 1938), *cert. denied*, U. S. Sup. Ct., March 6, 1939. The order involved the largest amount ever assessed against an employer for back wages. (1939) 4 L. R. R. 47. As a result of formal Board orders, 1,925 employees have been reinstated with a total of $284,201.73 paid in back wages, not including the *Carlisle* order. The actual number of back pay awards is much greater, however, in view of the numerous settlements made without formal Board proceedings. See (1939) 4 L. R. R. 55.

4. ". . . the provisions . . . were designed to insure that an employer would cease unfair labor practices." N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533, at 537 (C. C. A. 9th, 1938). See also N. L. R. B. v. Biles Coleman Lumber Co., 98 F. (2d) 18, at 23 (C. C. A. 9th, 1938).

5. The Board's own language supports this view. Reinstatement and back pay issues are discussed in the opinions under the heading "The Remedy." See, *e.g.*, *In re* Art Crayon Co., Inc., 7 NLRB 102, 119 (1938). See also, *In re* Colorado Milling & Elevator Co., 11 NLRB No. 16 (1939), and 3 ANNUAL REPORT NLRB (1938) 199, where such orders are described as remedial. The Supreme Court has held the Board's power to order affirmative action "remedial", and not punitive. Consolidated Edison Co. of N. Y., Inc., *et al.* v. N. L. R. B., U. S. Sup. Ct., (1938) 6 U. S. L. WEEK 425, at 429.

the Board has not bound itself to any rigid principle in deciding what the appropriate remedy in each case shall be, an order may jibe with neither a punitive nor a compensatory theory. As a matter of administrative policy, circumstances in particular cases may require making concessions and adjustments subject only to a consideration of the policies of the Act. In thus meeting the divergent situations which involve reinstatement and back pay problems, the Board has been working out its own common law under its broad discretionary power, and has gradually sketched the outline of its policy in various types of cases. Each case presents three problems for determination: the period for which back pay is to be granted; the rate and amount of remuneration; and the method in which payment shall be made.

The first determination, ascertainment of the duration of the payment, is least difficult where there has been an outright discriminatory discharge or lockout of employees. An employee is then ordinarily entitled to back pay from the date of the discrimination to the date of an offer of reinstatement[6] — a result consonant with either a punitive or a compensatory theory, since the penalty approximates the loss caused by the wrong. But this policy of matching violation of the Act against extent of loss is not always rigidly applied. Although strikers retain the status of employees,[7] and also may be ordered reinstated, nevertheless, for purposes of back pay, they are placed in a different category from discharged employees.[8] However logically it might be argued that one who has caused a strike through his unfair labor practices should be required to compensate striking employees for the loss of wages thus sustained, the Board's remedy has not gone so far, and back pay for the strike period has regularly been refused.[9] A striker, it is said, is himself responsible for his own loss by his voluntary severance of the employment tie. The Board therefore orders back pay only from the date of application

6. *In re* Martin Dyeing & Finishing Co., 2 NLRB 403 (1936); *In re* Jacob Cohen, 4 NLRB 720 (1937); *In re* Ronni Parfum, Inc., *et al.*, 8 NLRB No. 37 (1938). In these cases an actual discharge was found to be discriminatory. Some variation is presented by cases in which the employer's actions are interpreted as constituting a constructive discharge, forcing the employee to quit. Back pay is awarded in such a case from the date the employee was compelled to leave. *In re* Sterling Corset Co., Inc., 9 NLRB No. 79 (1938) (nervous tension from being kept under constant surveillance caused employees to leave); *In re* Harlan Fuel Co., 8 NLRB No. 3 (1938) (employee quit when he was transferred to work imperilling his life).

7. Included in the definition of "employee" in § 2(3) of the Act is "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ."

8. The distinction between discharged employees and strikers as to back pay status is emphasized in *In re* Sunshine Hosiery Mills, 1 NLRB 664 (1936). Discharged employes who refused offers of reinstatement during a strike which followed the discharges were held to be strikers in *In re* Elkland Leather Co., Inc., 8 NLRB No. 56 (1938). *Cf. In re* Hemp & Co., 9 NLRB No. 41 (1938); *In re* Lindeman Power & Equipment Co., 11 NLRB No. 66 (1939).

9. If a striker applies to the employer for reinstatement during or after the strike, and is refused, back pay is awarded from the date of such refusal, this being regarded as a discriminatory discharge. *In re* American Mfg. Co., 5 NLRB 443 (1938).

for reinstatement until an offer of re-employment is made.[10] This attitude has probably been adopted to encourage peaceful settlement of labor strife,[11] for although the punitive aspect of such a back pay award might have a strong deterrent effect on future unfair labor practices, its compensatory flavor would tend to stimulate resort to strikes in labor disputes, rather than to the legal machinery provided by the Statute.

Some cases in which the length of the back pay period is at issue raise the question of whether the Board must be controlled in determining its remedy by such equitable doctrines as laches, estoppel, or minimization of damages. In spite of the frequent assertion that these rules apply only in suits between private litigants,[12] the Board often appears to be influenced by considerations of an equitable nature in determining the time from which back pay is to run. Factors of delay for which the employer is not responsible may in some cases be regarded as justifying a departure from the usual rule of ascertaining duration of the period. If, for example, a discharged employee or the union acting in his behalf is dilatory in filing charges[13] or a case is reopened after having been withdrawn or closed for a considerable time,[14] the period of inaction is excluded from the back pay coverage.[15] In addition to these considerations of delay, mitigating circumstances of reliance and good faith may influence a variation in result. The employer's assumed reliance upon an

10. *In re* Sunshine Hosiery Mills, 1 NLRB 664 (1936). Under the holding in more recent cases, the period begins five days after the application for reinstatement. *In re* Tiny Town Togs, 7 NLRB 54 (1938).

11. See note 1, *supra*. The Board points with pride to the reduction in the number of strikes as compared to the increased number of cases which have been brought under the Act. 3 ANNUAL REPORT NLRB (1938) 1-3. See also Address by J. Warren Madden, Chairman of the National Labor Relations Board, in (1939) 3 L. R. R. 670; Larson, *The Labor Relations Acts—Their Effect on Industrial Warfare* (1938) 36 MICH. L. REV. 1237, at 1264.

12. *In re* Colorado Milling & Elevator Co., 11 NLRB No. 16 (1939) (laches); *In re* Shenandoah Dives Mining Co., 11 NLRB No. 67 (1939) (estoppel); N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533 (C. C. A. 9th, 1938) (minimization of damages, "clean hands"); N. L. R. B. v. Hearst *et al.*, 4 L. R. R. 166 (C. C. A. 9th, 1939) ("clean hands").

13. Delays of 19 and 11 months from the time of discharge to the time of filing charges were held unreasonable in *In re* Inland Lime & Stone Co., 8 NLRB No. 116 (1938), and back pay was granted only from the time of filing. In *In re* Crowe Coal Co., 9 NLRB No. 100 (1938), a union did not file charges until 6 months after its efforts to obtain reinstatement for discharged workers had been rejected. Back pay was awarded from the date of discharge to the date of the last conference between union and employes, and from the date of filing charges to an offer of reinstatement.

14. *In re* C. G. Conn, Ltd., 10 NLRB No. 38 (1938) (case reinstated 2 years after union's withdrawal); *In re* Kentucky Firebrick Co., 3 NLRB 455 (1937) and *In re* Whiterock Quarries, Inc., 5 NLRB 601 (1938) (cases closed after Intermediate Report were reopened a year later).

15. A nine month delay after a case was transferred to the Board was held to justify exclusion of that period. *In re* Cherry Cotton Mills, 4 NLRB 731 (1937), 98 F. (2d) 444 (C. C. A. 5th, 1938). But *cf. In re* Colorado Milling & Elevator Co., 11 NLRB No. 16 (1939), in which the Board denied the applicability of a doctrine of laches to its proceedings, and granted back pay for the three-year period during which the case had been pending.

opinion of the Trial Examiner adverse to the employee will cause exclusion of the interval between the time of this ruling and a later reversal by the Board, the belief being that the employer could not have been expected to reinstate the employee after the Trial Examiner's report.[16] Apparently, however, permissible reliance includes only continued inaction; for if the employer relies on the Trial Examiner's erroneous finding of no jurisdiction in order to make further discriminatory discharges, no time deduction will be granted.[17] In another type of case, the employer may be absolved from a liability for back wages if he has relied in good faith on an interpretation of a contract. Thus where an employer discharged employees under the erroneous belief that the terms of a closed shop agreement required their dismissals, he was relieved of the duty of paying any back wages for the entire period prior to the Board's decision.[18] This good faith exception reflects a punitive rather than a compensatory approach, for even though the employer's error and technical violation of the Act caused a loss to his employees, the Board refuses to penalize him since he had no intention of wrongdoing.[19] In the other examples of leniency, however, the employer's guilt in wrongfully violating the Act was in no way diminished by the fact that the charge against him was delayed, or final settlement of a case postponed, or that the Trial Examiner made an erroneous ruling. But the Board has apparently considered a concession to the employer in these cases as entirely justified,[20] however incompatible with punitive or compensatory principles it may appear to be.

16. *In re* E. R. Haffelfinger Co., 1 NLRB 760 (1936); *In re* Williams Coal Co. *et al.*, 11 NLRB No. 49 (1939). Back wages are awarded from the date of discrimination to the date of the Intermediate Report, and from the date of the Board's decision until an offer of reinstatement. On compensatory principles, the result in some cases seems unfair. Thus in *In re* The Grace Co., 7 NLRB 766 (1938), one employee received a smaller award than the others because the Trial Examiner's ruling had been incorrect only as to her.

17. In *In re* American Potash & Chemical Corp., 3 NLRB 140 (1937), [*order enforced*, 98 F. (2d) 488 (C. C. A. 9th, 1938), *cert. denied*, U. S. Sup. Ct., Feb. 27, 1939] the Trial Examiner's finding that there had been unfair labor practices but that the Board did not have jurisdiction was followed by wholesale discriminatory discharges. The Board refused to grant the usual deduction for the period between the Intermediate Report and the Board decision, attempting to distinguish the case from those in which no unfair labor practices were found by the Trial Examiner. The distinction is not borne out in other cases. See, *e.g.*, *In re* Kentucky Firebrick Co., 3 NLRB 455 (1937); *In re* Whiterock Quarries, Inc., 5 NLRB 601 (1938).

18. *In re* M. & M. Woodworking Co., 6 NLRB 372 (1938), *order set aside*, 4 L. R. R. 35 (C. C. A. 9th, 1939), (1939) 48 YALE L. J. 1059; *In re* Smith Wood Products, Inc., 7 NLRB 950 (1938).

19. The case in favor of the employer was particularly strong in *In re* M. & M. Woodworking Co., 6 NLRB 372 (1938), where a court decision had sustained the construction of the contract on which the employer relied. The Board's order was set aside by the Circuit Court of Appeals on the ground that there was no unfair labor practice. (1939) 4 L. R. R. 35, (1939) 48 YALE L. J. 1059.

20. That the good will of employers is regarded as important to the effective administration of the Act, see *In re* Shenandoah-Dives Mining Co., 11 NLRB No. 67 (1939), in which the Board dismissed charges against an employer who relied on a compromise agreement participated in by an agent of the Board.

In determining the back pay period, the Board may also take into account the economic condition of the employer and of the industry in which he is engaged, although once the period for payment and the amount owed is found, hardship in performance of an order is of no consequence.[21] If it can be shown that valid business reasons would have required a shutdown of the plant[22] or a discharge of certain employees[23] even if no unfair labor practices had occurred, then the employee is allowed back pay only for the period during which he would have held his job had there been no discrimination.[24] Such matters seem to be decided, however, merely as questions of fact the determination of which is necessary in order to discover what conditions call for remedial treatment, rather than under any guiding equitable principle in the employer's favor. The remedy granted makes the employee whole only for the loss occasioned by the unfair labor practices and relieves the employer of responsibility for loss caused by economic factors beyond his control.

The back pay period usually ends with an offer of reinstatement pursuant to Board order.[25] But back pay awards are not always accompanied by an order of reinstatement. If the employee discriminated against has obtained substantially equivalent employment elsewhere,[26] or indicates that he does not desire re-employment,[27] it has been the practice to allow him back pay for the period of enforced idleness attributable to the employer's unfair labor practice, the period in these cases closing when the other employment is obtained or when the old employment is refused. The Board never seems to have questioned its authority to grant such an order, for, just as in other cases, the employer is required to pay for no more than the deprivation caused by his unlawful act. This practice has recently been faintly tinged with doubt by a *dictum* in the *Carlisle Lumber* case[28] that reinstatement is a condition precedent to a back pay award. In pointing to this surprising result, the Circuit Court of Appeals first adopts the view of the *Mooresville* case,[29] that since the power to reinstate in Section 10(c) extends only to "employees," a person who has obtained regular and substantially equivalent employment

21. *Cf.* N. L. R. B. v. Remington Rand, Inc., 97 F. (2d) 195 (C. C. A. 2d, 1938).

22. In *In re* Regal Shirt Co., 4 NLRB 567 (1937), there were two shutdowns, the first motivated by union discrimination, and the second by legitimate business reasons. Employees were allowed back pay from the date of the first shutdown to the date of the temporary reopening of the plant.

23. *In re* Frederick R. Barrett, 3 NLRB 513 (1937); *In re* Benjamin Levine, 6 NLRB 400 (1938).

24. If it is impossible to determine from the evidence when a shutdown would have been necessary for business reasons, back pay will be refused. *In re* Leo L. Lowy, 3 NLRB 938 (1937); *cf. In re* Phillips Granite Co., 11 NLRB No. 72 (1939).

25. Or with placement on a preferential hiring list. *In re* Williams Coal Co. *et al.*, 11 NLRB No. 49 (1939).

26. *In re* Highway Trailer Co., 3 NLRB 591 (1937), *order enforced*, 95 F. (2d) 1012 (C. C. A. 7th, 1938); *In re* Empire Furniture Corp., 10 NLRB No. 92 (1939).

27. *In re* Williams Mfg. Co., 6 NLRB 135 (1938).

28. N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533, 537 (C. C. A. 9th, 1938), *cert. denied*, U. S. Sup. Ct., March 6, 1939. In N. L. R. B. v. Hearst *et al.*, 4 L. R. R. 166 (C. C. A. 9th, 1939), the same court allowed payment of back wages to personal representative of employee who died after Board order and before reinstatement.

29. Mooresville Cotton Mills v. N. L. R. B., 97 F. (2d) 959 (C. C. A. 4th, 1938).

cannot be reinstated, for he is not within the definition of "employee" in Section 2(3). But the *Mooresville* decision had held that even though reinstatement was not possible, a back pay award, justly deserved by the employee, was properly within the terms and policy of the Act.[30] The Court in the *Carlisle Lumber* case attempts to justify its position on the ground that a back pay provision is punitive, not compensatory; but the opinion does not explain why this theory, even if assumed to be correct,[31] should preclude an award of back pay without reinstatement. Indeed, the denial of back pay under such circumstances seems to penalize the employee for his diligence and good fortune in obtaining other employment.[32] Since the practical effect of requiring a forfeiture of back pay otherwise deserved may be to discourage the employee's efforts to seek other work, the rule in the *Mooresville* case seems decidedly more desirable. Furthermore, the Supreme Court's language in the *Fansteel* case lends persuasive force to an argument that the back pay remedy finds its source not in the specific power to order reinstatement but in the broad power to take affirmative action.[33]

Having determined the period for which back pay will be granted, the Board's next problem is to establish the rate and amount of payment. In working out this part of the remedy, the attempt is made to allow the employee as nearly as possible the amount he would have received had there been no discrimination on the employer's part. Normally the wage rate as of the time of discharge is used as a basis of computation; but if a wage increase or reduction has been effected since that time, a readjustment in accordance with the new rate is ordered.[34] In cases where this ordinary method of estimation is not feasible or will not approximate what the employee would actually have received, other rules are devised.[35] Thus where irregular working hours or piece work are involved, the Board will compute back payments on the basis of an average weekly or hourly earning over a

30. *Id.* at 963.

31. In the view of the United States Supreme Court, this theory is not correct. Consolidated Edison Co. of N. Y., Inc., *et al.* v. N. L. R. B., U. S. Sup. Ct., (1938) 6 U. S. L. WEEK 425, at 429; N. L. R. B. v. Fansteel Metallurgical Corp., U. S. Sup. Ct., (1939) 6 U. S. L. WEEK 896, at 899.

32. Some escape from the effect of the *Carlisle* dictum may be found in a strict construction of what is "regular and substantially equivalent employment." This is suggested by the Court itself when it says that these words involve a consideration of type of work, rate of pay, hours, working conditions and seniority rights. See N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533, at 539 (C. C. A. 9th, 1938); *cf. In re* L. C. Smith & Corona Typewriters, Inc., 11 NLRB No. 123 (1939).

33. N. L. R. B. v. Fansteel Metallurgical Corp., U. S. Sup. Ct. (1939) 6 U. S. L. WEEK 896, at 899.

34. *In re* Hardwick Stove Co., Inc., 2 NLRB 78 (1936); *In re* Washington Mfg. Co., 4 NLRB 970 (1938); *In re* The Grace Co., 7 NLRB 766 (1938); *In re* Lone Star Bag & Bagging Co., 8 NLRB No. 30 (1938).

35. In *In re* Acme Air Appliance Co., Inc., 10 NLRB No. 123 (1939), where a discriminatory delay in rehiring strikers was found, the amount payable to each was determined by taking the total amount earned by 8 new employees hired during this period and dividing it equally among the 8 strikers.

specified period prior to the discrimination[36] or on the basis of amounts earned by other employees during the period of discrimination.[37] In other cases the payment will also include extra compensation normally earned through tips[38] or bonuses,[39] and the reasonable value of special services and facilities supplied by the employer.[40]

Although the Board's remedial ideal in these cases seems to be to compensate the employee as fully as possible for the deprivation suffered, it has shown equal solicitude in preventing him from profiting by his unemployment. To this end, every order contains a provision for deduction of amounts earned elsewhere during the period specified for back pay.[41] However, several qualifications have been imposed upon this rule. In the first place, earnings of an extra-curricular nature are not required to be accounted for; only those amounts earned during hours that would otherwise have been spent working for the employer in question may be deducted.[42] Further, any deduction is in terms of a net amount, because it is recognized that since the effort to obtain the other position may entail transportation and lodging expenses that would not otherwise have been undertaken, allowance[43] should be made for these items in determining the amount to be deducted.[44] Still another important limitation on the usual rule of deduction is made where work relief, job insurance payments, or strike benefits have been received. At first, none of these payments were deductible as earnings.[45] The lack of correlation thus

36. *In re* Harry G. Beck, 3 NLRB 110 (1937) (eight weeks); *In re* The Grace Co., 7 NLRB 766 (1938) (two weeks). In *In re* Harlan Fuel Co., 8 NLRB No. 3 (1938), the employer's discrimination as to working conditions caused a severe reduction in the tonnage production of certain employees. The Board determined tonnage loss by subtracting the amounts earned during the period of discrimination from the amounts earned over a six-months period prior to the discrimination.

37. *In re* Clark & Reid Co., Inc., 2 NLRB 516 (1936); *In re* Sterling Corset Co., Inc., *et al.*, 9 NLRB No. 79 (1938).

38. *In re* Club Troika, 2 NLRB 90 (1936); *In re* Willard, Inc., 2 NLRB 1094 (1937), *order enforced*, N. L. R. B. v. Willard, Inc., 98 F. (2d) 244 (App. D. C. 1938).

39. *In re* Central Truck Lines, Inc., 3 NLRB 317 (1937).

40. *In re* Bell Oil & Gas Co., 2 NLRB 577 (1937), *order set aside*, N. L. R. B. v. Bell Oil & Gas Co., 98 F. (2d) 406 (C. C. A. 5th, 1938) (fair value of heating and light); *In re* National Weaving Co., Inc., 7 NLRB 743 (1938) (rent, water, and electricity at rate paid when employed).

41. See, *e.g.*, the orders in *In re* National Casket Co., Inc., 1 NLRB 963 (1936); *In re* Hardwick Stove Co., Inc., 2 NLRB 78 (1936).

42. *In re* Pusey, Maynes & Breish Co., 1 NLRB 482 (1936); *In re* National Motor Bearing Co., 5 NLRB 409 (1938).

43. But the employer has never been held liable for expenses incurred by the employee if the latter's search for employment is unsuccessful.

44. *In re* Crossett Lumber Co., 8 NLRB No. 51 (1938); *In re* Crescent Bed Co., Inc., 9 NLRB No. 39 (1938). The Board has not indicated to what type of expense it will limit these allowances. The order in *In re* Mount Vernon Car Mfg. Co., 11 NLRB No. 46 (1939), included a credit for laundry as well as for transportation, room, and board.

45. *In re* Vegetable Oil Products Co., Inc., 5 NLRB 52 (1938); *In re* Sterling Corset Co., Inc., *et al.*, 9 NLRB No. 79 (1938). But *cf. In re* Associated Press, 1 NLRB 788 (1936) (W. P. A. wages of one in managerial position held deductible).

resulting between the amount which the employer had to pay and the actual loss sustained by the employee seemed to point toward a punitive, instead of compensatory, exercise of the Board's power to order back pay. A more equitable result appears to have been reached in the modification adopted for work relief payments. These are now held deductible from the amount to be paid the employee; but the sum deducted, instead of being retained by the employer, is paid over to the fiscal agency of the government which supplied the relief funds.[46] But no modification of the rule has as yet been made in regard to strike benefits or job insurance payments.[47] This is perhaps justifiable when, as in the case of strike benefits, payments are made from a fund to which the employee has himself contributed.

The period for payment and the manner of computation once having been determined, the method of making disbursement presents no difficulty. Ordinarily the Board will merely order the employer to recompense the designated employees in accordance with instructions. Though there was earlier intimation to the contrary,[48] it is now apparently settled, at least in one of the circuits in which the question arose, that the Board need not specify in its order the names of employees to whom payments are to be made or the exact amounts due.[49] In the absence of such specification, the Board may supervise, subsequent to its order, the determination of recipients and the amounts payable.[50] It is becoming a more frequent practice, however, to settle these matters by a stipulation of the parties on which, if the Board approves, an order is entered.[51] The increase in the number of orders on stipulation in recent months indicates a trend which will permit speedier distribution in many cases, since any necessity for further hearing in regard to amounts due will be obviated.[52]

The precise limits of the Board's power to order back pay are as yet undefined. Under the Statute itself, the only limitation is one of purpose: to effectuate the policies of the Act.[53] The power to award back pay is of course indirectly curtailed when, in certain instances, the Board's authority

46. *In re* Republic Steel Corp., 9 NLRB No. 33 (1938); *In re* Union Drawn Steel Co., *et al.*, 10 NLRB No. 76 (1938).

47. *In re* Missouri-Arkansas Coach Lines, Inc., 7 NLRB 186 (1938).

48. Agwilines, Inc. v. N. L. R. B., 87 F. (2d) 146 (C. C. A. 5th, 1936); N. L. R. B. v. Pacific Greyhound Lines, Inc., 91 F. (2d) 458 (C. C. A. 9th, 1937), *rev'd*, 303 U. S. 272 (1938); N. L. R. B. v. Carlisle Lumber Co., 94 F. (2d) 138 (C. C. A. 9th, 1937), *cert. denied*, 304 U. S. 575 (1938).

49. N. L. R. B. v. Carlisle Lumber Co., 99 F. (2d) 533 (C. C. A. 9th, 1938), *cert. denied*, U. S. Sup. Ct., March 6, 1939.

50. *In re* United Aircraft Mfg. Co., Inc., 1 NLRB 236 (1936); *In re* Haffelfinger Co., Inc., 1 NLRB 760 (1936).

51. *In re* National Tea Co., 9 NLRB No. 25 (1938). The fact that individual employees object to a stipulation made between the employer, the union which filed charges, and counsel for the Board will not prevent approval and entry of an order by the Board. *In re* Champion Paper & Fibre Co., 10 NLRB No. 64 (1938).

52. Such orders have been numerous since the summer of 1938. They often provide for the deposit of a certain sum with the Regional Director, to be distributed in settlement of back pay. See, *e.g.*, *In re* Breeze Corporations, Inc., 10 NLRB No. 105 (1939).

53. See note 1, *supra*.

to reinstate is denied,[54] for in most cases the two orders are concomitant. However, the foregoing discussion has been concerned not with the propriety of reinstatement, but only with the Board's administration of the back pay provision when reinstatement is deserved. Within the framework of the provision, the Board has thus far had a fairly free hand in working out the rules by which it determines the back pay coverage and method of computation in each case. Its temperate treatment of these perplexing problems has eminently justified this broad range of discretion.

## EQUITABLE JURISDICTION OF PROBATE COURTS AND FINALITY OF PROBATE DECREES*

PROMPTED by the desire to effectuate swift settlement of decedents' estates and to insure certainty of title in the new owners of the estate property, constant efforts have been made to increase the finality afforded decrees of probate courts.[1] Probate courts have been labeled courts of record the judgments of which are entitled to presumptions of regularity and may not be collaterally attacked.[2] In states recognizing probate in common form, statutes provide that after a limited period for contest[3] probate is forever final.[4] Accordingly, even where a fraud or forgery that would have defeated probate of the will is discovered after the statutory period for contest, equity is barred from either setting aside probate or imposing a constructive trust upon the

54. N. L. R. B. v. Fansteel Metallurgical Corp., U. S. Sup. Ct. (1939) 6 U. S. L. WEEK 896; N. L. R. B. v. Sands Mfg. Co., U. S. Sup. Ct. (1939) 6 U. S. L. WEEK 887.

* Holland v. Bradley, 118 S. W. (2d) 262 (Ark. 1938).

1. For the meaning of "probate," see ATKINSON, WILLS (1937) 426; WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) 492, 701, 774.

2. Graham v. Graham, 175 Ark. 530, 1 S. W. (2d) 16 (1927); Reitz v. Smith, 56 Ohio App. 72, 10 N. E. (2d) 150 (1937); see WOERNER, *op. cit. supra* note 1, at § 145; Bartlett, *Some Problems in Probate Jurisdiction* (1936) 5 J. B. A. KAN. 143; (1936) 50 HARV. L. REV. 367.

3. There is no uniformity in methods of contest, even among states recognizing probate in common form. See ATKINSON, *op. cit. supra* note 1, at §§ 174-185; WOERNER, *op. cit. supra* note 1, at §§ 215-217; Carey, *Jurisdiction Over Decedents' Estates* (1929) 24 ILL. L. REV. 44. In some jurisdictions provision is made for probate in solemn form only. *E.g.*, N. Y. SURROGATES' COURT ACT (Gilbert-Bliss, 1937) §§ 40, 48-51; CONN. GEN. STAT. (1930) §§ 4766, 4884. But here no time limitation is placed upon the right to probate. ATKINSON, *op. cit. supra* note 1, at 434.

4. The Ohio statute is typical. OHIO GEN. CODE ANN. (Page, 1938) § 10504-32. The stipulated period in the majority of states is six months to one year, but in a few states is as long as seven years.

beneficiaries of the probated will,[5] frequently upon a *res judicata* rationale.[6] But wherever a limitation exists upon the jurisdiction of a probate court, there is a corresponding loophole in the conclusiveness of its decree.[7] While there has been a tendency, varying in extent from state to state, to concentrate in a single court the duties of probating wills and the administration and settlement of decedents' estates,[8] this development in the great majority of states has not reached the point where general equitable jurisdiction has been granted the probate courts. Where, therefore, the probate court cannot render adequate relief, equity must be called upon to lend assistance.

In two analogous situations the equitable remedial device of the constructive trust has been generally granted. Where a beneficiary under a will induces the gift by an express or implied parol promise to the decedent to effectuate a certain distribution of the property given, a trust is imposed if the promise is not performed, whether or not the contest period has passed.[9] If these facts were raised on contest, the majority of probate courts, empowered only to accept or reject wills, would be unable to render requisite relief.[10] Since in most cases intestacy would not accomplish the same result as performance of the promise, the equitable remedy of impressing a trust is desirable in order to effectuate the testator's intentions. Likewise, in the situation where

5. Sumner v. Staton, 151 N. C. 198, 65 S. E. 902 (1909); Reeves v. Bridges, 193 Ark. 292, 99 S. W. (2d) 242 (1936); see PAGE, THE LAW OF WILLS (2d ed. 1926) § 532; Warren, *Fraud, Undue Influence and Mistake in Wills* (1928) 41 HARV. L. REV. 309. A distinction is made between extrinsic and intrinsic fraud, the latter being fraud in obtaining the will while the former is fraud in obtaining probate. Equity is not barred from lending assistance where extrinsic fraud is involved. Seeds v. Seeds, 116 Ohio St. 144, 156 N. E. 193 (1927) (suppression of notice of probate); *cf.* Ferguson v. Wachs, 96 F. (2d) 910 (C. C. A. 7th, 1938); see Stansell, *The Power of a Court of Equity to Give Relief from Decrees of the Probate Court* (1935) 13 CHI.-KENT REV. 91.

6. *E.g.*, Case of Broderick's Will, 88 U. S. 503 (1874); see Note (1928) 52 A. L. R. 779. Some courts have allowed a tort action in this situation, holding that it is not a collateral attack upon probate because it in no way contravenes the policies fostering probate finality. See, generally, Vanneman, *The Constructive Trust: A Neglected Remedy in Ohio* (1936) 10 U. OF CIN. L. REV. 366; (1931) 31 COL. L. REV. 1203; (1935) 48 HARV. L. REV. 984.

The use of the concept of *res judicata* is especially unfortunate in situations where the statutory period has passed without contest. The bar is not a prior adjudication, but merely a perfunctory registration of a will followed by the lapse of the contest period, conclusive only because of statutory declaration. *Cf.* note 13, *infra.*

7. See ATKINSON, *op. cit. supra* note 1, at 225; (1931) 31 COL. L. REV. 1203.

8. See WOERNER, *op. cit. supra* note 1, at §§ 140-141.

9. *Before lapse of contest period:* Shrader's Ex'r v. Shrader, 228 Ky. 374, 15 S. W. (2d) 246 (1929); Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933). *After contest period:* Winder v. Scholey, 83 Ohio St. 204, 93 N. E. 1098 (1910); Garland v. Higgins, 160 Tenn. 381, 25 S. W. (2d) 583 (1930). See Note (1930) 66 A. L. R. 156; Scott, *Conveyances Upon Trusts Not Properly Declared* (1924) 37 HARV. L. REV. 653; Vanneman, *supra* note 6, at 379 *et seq.* A trust is also generally imposed where an heir has persuaded decedent by an oral promise to refrain from executing a will. Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767 (1899); Mead v. Robertson, 131 Mo. App. 185, 110 S. W. 1095 (1908); see Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises or Intestate Succession* (1915) 28 HARV. L. REV. 237, 366.

10. See Warren, *supra* note 5, at 323.

probate of a prior will cannot be contested in the probate court, in spite of the testator's attempt to make a later will, a constructive trust is generally imposed. Such a situation would arise if the beneficiaries under the later will were unable to show sufficient interest to contest[11] because of the destruction of that will or because its execution was fraudulently prevented.[12] Since in these cases the majority of probate courts furnishes no adequate remedy, the bars to equitable interference are not raised. Statutory declarations of the finality of probate are not enforced and the concept of *res judicata* is not applied.[13]

A recent case raised the question of trust imposition within a novel situation. A testator bequeathed all his property to one nephew. Probate of the will was contested by nieces and other nephews on the ground that the testator had been unduly and fraudulently influenced in making the will by the sole legatee's assurance that he would carry out the testator's design to distribute the estate among the nephews and nieces according to the descent and distribution statute. Judgment was entered by the circuit court on probate appeal upholding the will. Meanwhile, the contestants filed a complaint in chancery court alleging the same facts and seeking the imposition of a constructive trust upon the sole legatee and administrator of the estate. The Supreme Court of Arkansas, in affirming the dismissal of the complaint, held that the circuit court's judgment upholding the will barred the suit in equity. The court relied upon the joint doctrines of *res judicata* and election of remedies, resting the decision, with some ambiguity, partly on each ground.[14]

The result of the instant case can be deemed desirable only upon the assumption that the contestants' claim was completely speculative. The rationale upon which the court based its decision, however, appears unjustifiable. The sole issue at contest was whether the will was validly executed, and probate could have been denied only if it had been proved that the promisee at the time the promise was made did not intend to fulfill his agreement. No such intent was found at contest by either jury or court, since the validity of the will was upheld. Yet notwithstanding the valid execution of the will, the promise may in fact have been made and have been breached without the initial fraudulent intent. To void the will in this situation would be doctrinally impossible because of valid execution and functionally undesirable because it would generally defeat the testator's intentions. Therefore a constructive trust furnishes the contestants with their only available remedy. This issue is cognizable only in a court of equity in the particular jurisdiction where the instant case was decided.[15] The fact that suc-

11. See ATKINSON, *op. cit. supra* note 1, at § 188; (1929) 3 U. OF CIN. L. REV. 107.

12. Gaines v. Chew, 43 U. S. 619 (1844); Thomas v. Briggs, 98 Ind. App. 352, 189 N. E. 389 (1934); see Note (1935) 98 A. L. R. 474; Scott, *supra* note 9, at 653; Warren, *supra* note 5, at 309.

13. See Garland v. Higgins, 160 Tenn. 381, 388, 25 S. W. (2d) 583, 585 (1930); Brazil v. Silva, 181 Cal. 490, 493, 185 Pac. 174, 175 (1919).

14. Holland v. Bradley, 118 S. W. (2d) 262 (Ark. 1938). The majority opinion does not specifically use the term *"res judicata,"* but from the dissenting opinion it is apparent that the defense in equity was a plea of *res judicata.*

15. See note 28, *infra.*

cessful contest would have earned the contestants their intestate shares[16] and the imposition of a trust pursuant to the alleged promise would have brought the claimants the same shares neither alters the different issues before probate and equity courts, nor expands the limited jurisdiction of the probate court. In adopting the terminology of *res judicata,* therefore, the court established a dangerous precedent — barring equitable enforcement of an oral promise or a spoliated will by any beneficiary who had unsuccessfully contested the will.[17] Nor should the instant decision have been rested on the doctrine of election of remedies. It is an unfortunate concept to introduce into an already confused field;[18] and the prerequisite for its application — that the same evidence should satisfy the requirements for either of the alternative remedies — is not satisfied in this situation.[19]

The real reason for this conceptual confusion does not lie in a choice of arguments, however, but rather in the fact that the restricted jurisdiction of the majority of probate courts is insufficient to settle decedents' estates without aid from other courts. The grant of equitable powers to the probate courts would eradicate the present confusion. Although probate jurisdiction is entirely dependent upon statutes which resemble one another only in broad outline, there may be detected a slight trend in the desired direction. State probate practice is of two general types, the one found in those jurisdictions where probate matters are part of the business of the established courts,[20] the other in those states where separate and independent courts are established.[21] In the first category, the courts of fourteen jurisdictions have general equity powers,[22] but, when acting as probate courts, they may employ those general powers in only three states.[23] In the others, when equitable relief

16. There being no prior will, intestacy would have followed a successful contest.

17. Carried to its extreme this result might possibly bar a beneficiary under an oral promise or a spoliated will from equitable aid even where the statutory period passed without contest.

18. See Hine, *Election of Remedies, A Criticism* (1913) 26 HARV. L. REV. 707; Rothschild, *A Remedy for Election of Remedies* (1929) 14 CORN. L. Q. 141.

19. See Comment (1938) 38 COL. L. REV. 292. Generally the doctrine of election of remedies does not bar an assertion of a claim against the estate after the claimant has contested the will. Spencer v. Spencer, 25 R. I. 239, 55 Atl. 637 (1903); Hubbard v. Ball, 81 P. (2d) 73 (Idaho 1938); *cf.* Stamp v. Banninga, 221 Mich. 268, 191 N. W. 25 (1922).

20. Arizona, California, Colorado, Florida, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wyoming and the District of Columbia.

21. Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont and Wisconsin.

But some of these jurisdictions make provision for a trial *de novo* in a higher court, *e.g.,* CONN. GEN. STAT. (1930) § 4990; *cf.* WOERNER, *op. cit. supra* note 1 at § 550.

22. Arizona, California, Indiana, Iowa, Louisiana, Mississippi, Montana, Nevada, North Carolina, Utah, Virginia, Washington, Wyoming, and the District of Columbia.

23. *Ex parte* Crandall, 52 F. (2d) 650 (S. D. Ind. 1931); *In re* Agee's Estate, 69 Utah 130, 252 Pac. 891 (1927); *In re* Krause's Estate, 173 Wash. 1, 21 P. (2d) 268 (1933).

is necessary, a new action must be started, addressed to the same court sitting as an equity rather than a probate court, a procedure which appears to be unnecessary and time-consuming.[24] Where probate jurisdiction is given to established courts which have no general equity powers,[25] limited "equitable principles" may be applied in some states.[26] Similar variation exists in the states which have separate probate courts. Eight apparently allow the probate courts no equitable powers.[27] Ten adhere to the vague abstraction that although the courts have no general equity jurisdiction, equitable principles may be applied.[28] Uncertain as this proposition is, at least it is clear that within the confines of the rule the power to impress a trust cannot be discovered.[29] Only six states in this group expressly bestow plenary equity powers upon the probate courts. The Maine and Massachusetts statutes grant equitable jurisdiction concurrent with that of the supreme judicial and superior courts in all matters relating to estate administration,[30]

24. *E.g., In re* Silva's Estate, 169 Cal. 116, 145 Pac. 1015 (1915); *In re* Skinner's Estate, 215 Iowa 1021, 247 N. W. 484 (1933); Poston v. Delfelder, 39 Wyo. 163, 270 Pac. 1068 (1928) (specific performance granted by district court sitting as probate court only where specific statutory authorization).

25. COLO. ANN. STAT. (Mills, 1930) § 1650; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 5183; KY. STAT. ANN. (Carroll, 1936) § 1057; NEB. COMP. STAT. (1929) § 27-502; N. D. COMP. LAWS ANN. (1913) § 8929; OKLA. STAT. (Harlow, 1931) § 3951; ORE. CONST. art. VII, § 12; S. D. COMP. LAWS (1929) §§ 2118-2119; TENN. CODE ANN. (Williams, 1934) §§ 10225-10232; TEX. CONST. art. V, § 16; W. VA. CODE ANN. (Michie, 1937) § 357. In some of the foregoing states these courts have equitable powers of an extremely limited nature. McLaughlin v. Rote, 62 Colo. 505, 163 Pac. 841 (1917); First Nat. Bank of St. Petersburg v. MacDonald, 100 Fla. 675, 130 So. 596 (1930). Instead of granting general equitable jurisdiction some states have attempted to facilitate estate administration by allowing probate courts to exercise the equitable remedy of specific performance. Fox v. Fox, 57 N. D. 368, 221 N. W. 889 (1928); Poston v. Delfelder, 39 Wyo. 163, 270 Pac. 1068 (1928); see POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) § 497.

26. Fox v. Fox, 57 N. D. 368, 221 N. W. 889 (1928); *In re* Frerichs' Estate, 120 Neb. 462, 233 N. W. 456 (1930).

27. *In re* Blackinton's Estate, 29 Idaho 310, 158 Pac. 492 (1916); *In re* Hedin's Estate, 140 Kan. 329, 36 P. (2d) 1006 (1934); Beckwith v. McAlister, 165 S. C. 1, 162 S. E. 623 (1932). It appears that the question in Delaware, Georgia and New Hampshire has not been definitely raised, while authority in New Mexico and Rhode Island is of questionable weight. Perea v. Barela, 6 N. M. 239, 27 Pac. 507 (1891); Hall v. Anthony, 13 R. I. 221 (1881).

28. Courson v. Tollison, 226 Ala. 530, 147 So. 635 (1933); Arkansas Valley Trust Co. v. Young, 128 Ark. 42, 195 S. W. 36 (1917); Howard v. Swift, 356 Ill. 80, 190 N. E. 102 (1934); Redwood v. Howison, 129 Md. 577, 99 Atl. 863 (1917); *In re* Cox's Estate, 284 Mich. 628, 279 N. W. 913 (1938); State *ex rel.* Union Nat. Bank v. Probate Court of Ramsey County, 103 Minn. 325, 115 N. W. 173 (1908); State *ex rel.* Kemp v. Arnold, 113 S. W. (2d) 143 (Mo. App. 1938); Easton v. Goodwin, 119 N. J. Eq. 114, 181 Atl. 275 (Ch. 1935); Miller v. Fulton, 206 Pa. 595, 56 Atl. 74 (1903); Mathews v. Drew, 106 Vt. 245, 172 Atl. 638 (1934).

29. Graham v. Birch, 47 Minn. 171, 49 N. W. 697 (1891); *In re* Glover, 127 Mo. 153, 29 S. W. 982 (1895); State Life Ins. Co. v. Williams, 81 P. (2d) 481 (Cal. App. 1938); see Gifford, *Will or No Will?* (1920) 20 COL. L. REV. 862.

30. ME. REV. STAT. (1930) c. 75, § 2; MASS. ANN. LAWS (1932) c. 215, § 6.

the latter statute specifically providing for the imposition of constructive trusts.[31] In New York and Ohio, the probate courts have been given plenary equity jurisdiction of the widest scope.[32] In two other states, the courts have construed the statutory grants of jurisdiction to probate courts to include full equitable powers.[33]

It appears, then, that the probate courts of nine states have equity powers that permit, for example, the imposition of trusts. This removal of the disability of the probate courts to render adequate relief in all situations makes possible the attainment of the goal underlying and inducing probate finality. All questions involved in the administration of an estate can be determined by the same court and a more expeditious and convenient settlement can be achieved without the delays of filing new pleadings and awaiting trial of new and separate actions.[34] And the confusion exemplified in the principal case as to what effect should be given to the probate court's decree disappears. To be sure, the feasibility of granting equitable jurisdiction to all probate courts must not be considered solely from the litigant's point of view. While the ideal system would appear to be an independent court with competent judges and full powers, legal and equitable, the financial burden and limited geographical range of such courts may prevent their maintenance in localities of relatively small population where probate work is not great and is often administered by clerks and laymen.[35] But even

31. The remedy must be one available in equity. Mitchell v. Weaver, 242 Mass. 331, 136 N. E. 166 (1922) (equitable replevin) Jones v. Jones, 7 N. E. (2d) 1015 (Mass. 1937) (constructive trust). The relief sought must be incidental to the administration of the decedent's estate before the court. Black v. Abercrombie, 267 Mass. 316, 166 N. E. 836 (1929); Russell v. Shapleigh, 275 Mass. 15, 175 N. E. 100 (1931).

32. SURROGATES' COURT ACT (Gilbert-Bliss, 1937) § 40; OHIO GEN. CODE ANN. (Page, 1938) § 10501-53. In New York the surrogates were given plenary equity powers in 1921. *In re* Pulitzer's Estate, 139 Misc. 575, 249 N. Y. Supp. 87 (Surr. Ct. 1931); see Coster, *The Equitable Jurisdiction of Surrogates' Court in New York* (1936) 10 ST. JOHN'S L. REV. 199; Wingate, *The Surrogates' Court of the State of New York* (1933) 2 BROOKLYN L. REV. 165. These powers definitely permit trust imposition. *In re* McArdle's Estate, 140 Misc. 257, 250 N. Y. Supp. 276 (Surr. Ct. 1931); *In re* Van Muffling's Estate, 154 Misc. 300, 277 N. Y. Supp. 584 (Surr. Ct. 1935). The requirement that the equitable powers may only be evoked over matters relating to decedents' estates is strictly enforced. *In re* Crosby's Estate, 136 Misc. 688, 242 N. Y. Supp. 207 (Surr. Ct. 1930) (no jurisdiction over *inter vivos* trust because not a part of decedent's estate); *In re* Lyon's Ex'rs, 266 N. Y. 219, 194 N. E. 682 (1935).

33. Delaney v. Kennaugh, 105 Conn. 557, 136 Atl. 108 (1927); Shupe v. Jenks, 195 Wis. 334, 218 N. W. 375 (1928); *In re* George's Estate, 225 Wis. 251, 274 N. W. 294 (1937).

34. "To remit the claimant to another forum after all these advances and retreats, these reconnaissances and skirmishes, would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has invoked." Cardozo, J., in Raymond v. Davis' Estate, 248 N. Y. 67, 72, 161 N. E. 421, 423 (1928). The combining in one court of the jurisdiction sufficient to settle all questions involved in estate settlement has been accomplished in England. See PAGE, *op. cit. supra* note 5, at § 531.

35. In some states probate matters are dealt with by clerks of courts until motion for contest is filed. IOWA CODE (1935) § 11832; N. C. CODE ANN. (Michie, 1935) § 1; UTAH REV. STAT. ANN. (1933) § 7564; VA. CODE ANN. (Michie, 1936) § 5247. Although

where independent courts are impractical, no reason appears for denying that court which adjudicates the legal questions the power to determine in the same action the equitable issues. If such additional work should crowd the dockets, it would probably indicate the need of that community for a separate court.[36] In any case, it is clear that the desired finality for probate decrees can never be completely achieved without general conformity to those probate systems which embrace equitable jurisdiction.

## APPORTIONMENT OF PROFITS IN COPYRIGHT INFRINGMENT CASES*

INCREASING dissatisfaction with the operation of the present obsolete copyright legislation[1] has inspired many recent attempts to reform the entire copyright structure.[2] Section 25 of the Copyright Act of 1909,[3] providing for the remedies and penalties to be imposed in case of infringement, has been the subject of particularly vitriolic criticism.[4] The Section provides for an injunction restraining infringement and imposes liability for "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits, such damages as to the

not a competent system, it may correspond to the financial resources and meet the probate needs of these jurisdictions. In some states the probate judges are laymen. See Smith, *Some Comments on the District Probate System* (1933) 7 CONN. B. J. 56.

36. A probate system need not be uniform throughout a state. Several states base distinctions in probate practice upon population. ILL. ANN. STAT. (Smith-Hurd, 1934) c. 37, § 299; N. Y. CONST. art. VI, § 13.

*Sheldon v. Metro-Goldwyn Pictures Corp., 26 F. Supp. 134 (S. D. N. Y. 1938).

1. 35 STAT. 1075 (1909), 17 U. S. C. §§ 1–63 (1934). Essentially unaltered since 1909, the present Act has long been the subject of general criticism. Solberg, *Copyright Law Reform* (1925) 35 YALE L. J. 48; Solberg, *The Present Copyright Situation* (1930) 40 YALE L. J. 184. It has been adversely criticized especially in its application to modern methods of marketing copyright material. Simpson, *The Copyright Situation As Affecting Radio Broadcasting* (1931) 9 N. Y. U. L. Q. REV. 180. But see Caplan, *The Measure of Recovery in Actions For the Infringement of Copyright* (1939) 37 MICH. L. REV. 564.

2. *Hearings before Committee on Patents on Revision of Copyright Laws* (House of Representatives), 74th Cong., 2d Sess. (1936) *passim*; SEN. REP. No. 896, 74th Cong., 1st Sess. (1935) 1–2; Comment (1938) 47 YALE L. J. 433; Legis. (1938) 51 HARV. L. REV. 906. For an analysis of many proposed amendments see Solberg, *The Present Copyright Situation* (1930) 40 YALE L. J. 184.

3. 35 STAT. 1075 (1909), 17 U. S. C. § 25 (1934).

4. See *Hearings, op. cit. supra* note 2, at 115, 1106, 1187; Comment (1938) 47 YALE L. J. 433, 436; Simpson, *The Copyright Situation As Affecting Radio Broadcasting* (1931) 9 N. Y. U. L. Q. REV. 180; MARCHETTI, LAW OF THE STAGE, SCREEN AND RADIO (1936) 29 *et seq.*

court shall appear to be just . . . "[5] The Section was apparently intended to replace with a broad judicial discretion the fixed and arbitrary standards of the common law, at the same time insuring a substantial but reasonable recovery to the copyright owner.[6] Unfortunately, the courts have interpreted the provision with anything but uniformity and have frequently relied on old case authority which the Statute was designed to abrogate.[7] It seems that only by legislative revision can the resultant unfairness and ambiguity be removed.

A recent decision aptly illustrates the urgent need for reform. Defendant's motion picture "Letty Lynton" was held to infringe the copyright of plaintiff's play "Dishonored Lady." Further distribution of the picture was enjoined.[8] The case was then referred to a special master to determine the amount of plaintiff's recovery. The master determined that defendant's net profits from the picture were $587,604.37. No actual damages were proved. Defendant introduced evidence to show that the picture's profits were principally attributable to the box office drawing power of its principal stars, Joan Crawford and Robert Montgomery. Defendant also proved that before the Hays office interposed its veto plaintiff had agreed to sell the motion picture rights to defendant for $30,000. The court reluctantly held that although the evidence would justify a finding that the play was not responsible for more than twenty-five per cent of the total profits, it was compelled, under Section 25 and existing case authority, to award to the plaintiff the entire net profits of the production.[9]

The source of this inequitable result lies first in a series of cases decided prior to the enactment of the present Statute.[10] In the now famous case of *Mawman v. Tegg*,[11] Lord Eldon inaugurated the rule that in case of an infringement, even though the entire copyrighted work is not plagiarized, if portions thereof are so intermingled with the rest of the piratical work that

5. 35 STAT. 1075 (1909), 17 U. S. C. § 25b (1934). The discretionary award of statutory damages is limited by certain maximum and minimum amounts for various types of infringement. The minimum requirement has created serious problems of interpretation and been generally condemned. See generally WEIL, COPYRIGHT LAW (1917) 469; Solberg, *Copyright Law Reform* (1925) 35 YALE L. J. 48.

6. "The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give to the owner of a copyright some recompense for the injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." Roberts, J. in Douglas v. Cunningham, 294 U. S. 207, 209 (1935). See AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 1111 *et seq.*

7. See Westerman Co. v. Dispatch Printing Co., 249 U. S. 100 (1919); Jewell-La Salle Realty Co. v. Buck, 283 U. S. 202 (1931); Harold Lloyd v. Witmer, 65 F. (2d) 1 (C. C. A. 9th, 1933); WEIL, COPYRIGHT LAW (1917) 469.

8. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. (2d) 49 (C. C. A. 2d, 1936) *cert. denied*, 298 U. S. 669 (1936).

9. Sheldon v. Metro-Goldwyn Pictures Corp., 26 F. Supp. 134 (S. D. N. Y. 1938).

10. Elizabeth v. Pavement Co., 97 U. S. 126 (1877); Callaghan v. Myers, 128 U. S. 617 (1888); Belford v. Scribner, 144 U. S. 488 (1892); West Publishing Co. v. Lawyers Co-op. Ass'n, 79 Fed. 756 (C. C. A. 2d, 1897). See generally DRONE ON COPYRIGHT (1879) 496 *et seq.*

11. [1826] 2 Russell 385.

the derivative is indistinguishable from the original material, there can be no apportionment of profits.[12] Feeling, however, the unfairness of denying all redress for the infringement, Eldon awarded the copyright owner the entire net profits realized by the defendant. The results were rationalized by an analogy to the common law doctrine of confusion of goods: one who inextricably intermingles his own goods with those of another, making separation impossible, must suffer the consequences of his own wrong.[13] This decision, a landmark in copyright law, was followed in a long line of cases and approved by the United States Supreme Court.[14]

With the enactment of the present Statute, however, the necessity of following these precedents disappeared. The discretionary powers vested in the courts by the precise wording of Section 25 were designed to eliminate the anomalous results of the Eldon principle, and many courts have expressly denied the binding effect of the old cases since the adoption of that Section.[15] Persistence of the tendency on the part of some courts to avoid uncertain, speculative approximations, however, has left the interpretation of the "in lieu" clause still unsettled.[16] When actual damages and profits are completely unascertainable, the courts have consistently applied their discretionary powers under the statutory damage provision to award a reasonable recovery to the copyright owner.[17] It also seems well settled that the courts may exercise their discretion over damage awards whether actual damages are determinable

12. All formulas for apportioning the profits were rejected as being too speculative and uncertain. COPINGER, LAW OF COPYRIGHT (7th ed. 1936) 159; AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 1127 *et seq.*

13. See Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251 (1916); WEIL, COPYRIGHT LAW (1917) 465, 474. But see L. Hand, J. in Cincinnati Car Co. v. N. Y. Rapid Transit Co., 66 F. (2d) 592, 593 (C. C. A. 2d, 1933) (" . . . infringement often involves nice and casuistical questions which it is mere artifice to treat as involving moral delinquency.").

14. Callaghan v. Myers, 128 U. S. 617 (1888); Belford v. Scribner, 144 U. S. 488 (1892). See Caplan, *The Measure of Recovery In Actions for the Infringement of Copyright* (1939) 37 MICH. L. REV. 564, 570; MCCORMICK, DAMAGES (1935) c. 3.

15. See note 6, *supra*; Harold Lloyd Corp. v. Witmer, 65 F. (2d) 1, 46 (C. C. A. 9th, 1933); (1939) 52 HARV. L. REV. 688.

16. The Statute provides for damages and profits *or* in lieu thereof "such damages as to the court shall appear to be just." 35 STAT. 1075 (1909), 17 U. S. C. § 25b (1934). Since the Statute is written in the alternative, it would seem that the court might assume discretionary powers in making the award in every case, regardless of whether actual damages or profits are proved or not. See Wells v. American Bureau of Engineering, 285 Fed. 371 (C. C. A. 7th, 1922). Hesitancy to assume such responsibility may have influenced the generally accepted contrary interpretation. Compare Davilla v. Brunswick Balke Collender Co., 94 F. (2d) 567 (C. C. A. 2d, 1938) with Haas v. Feist, 234 Fed. 105 (S. D. N. Y. 1916) and Atlantic Monthly Co. v. Post Publishing Co., 27 F. (2d) 556 (D. Mass. 1928).

17. Westerman Co. v. Dispatch Printing Co., 249 U. S. 100 (1919); No-Leak-O Piston Ring Co. v. Norris, 277 Fed. 951 (C. C. A. 4th, 1921); Turner & Dahnken v. Crowley, 252 Fed. 749 (C. C. A. 9th, 1918). Within the limits of the statutory minimum and maximum amounts the discretion of the trial court is unlimited and will not be reviewed by an appellate court. Douglas v. Cunningham, 294 U. S. 207 (1935); AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 1111 *et seq.*

or not.[18] *Dicta* in the decided cases, however, indicate that they are without authority to deny an accounting for profits; and proof of some specific amount of profits results *ipso facto* in full recovery.[19] No valid basis for this distinction between the treatment of damages and profits can be found in the Statute, and the idea that litigants may demand the traditionally discretionary, equitable remedy of an accounting has been repugnant to many equity courts.[20] Nevertheless, the court in the instant case felt sufficiently bound by such authority to hold that since the "in lieu" clause was applicable only when it is impossible to prove any specific amount of actual damages or profits, proof of the net return in the instant case precluded the application of the court's discretionary powers.[21] This narrow construction of the statutory language represents a serious limitation of the broad discretionary powers Congress attempted to confer.

But even if it be granted that the court is correct in denying the application of the "in lieu" clause, the unwarranted award of profits admittedly not attributable to the infringement of plaintiff's play can hardly be justified. The entire sum awarded concededly does not represent the "profits . . . made from such infringement . . ."[22] Incorporation of parts of the theme of a play certainly is not responsible for all the lucrative returns of the modern motion picture. In recognition of the unfairness of similar results in analogous patent litigation, the courts, acting entirely without statutory authorization, finally reversed the prior policy of avoiding all speculation and adopted the "reasonable royalty rule."[23] Where the patent infringed constituted but a minute part of the completed machine, the Supreme Court suggested reliance upon expert testimony to furnish a reasonable approximation of the actual profits

18. Russell & Stoll Co. v. Oceanic Elec. Co., 80 F. (2d) 864 (C. C. A. 2d, 1936); Mail & Express Co. v. Life Publishing Co., 192 Fed. 899 (C. C. A. 2d, 1912). *Cf.* Fisher, Inc. v. Dillingham, 298 Fed. 145, 152 (S. D. N. Y. 1924).

19. See Davilla v. Brunswick Balke Collender Co., 94 F. (2d) 567, 568 (C. C. A. 2d, 1938); Straus v. Penn Printing Co., 220 Fed. 977, 980 (E. D. Penn. 1915). But see West Publishing Co. v. Thompson, 176 Fed. 833 (C. C. A. 2d, 1910); McCaleb v. Fox Film Corp., 299 Fed. 48 (C. C. A. 5th, 1924).

20. Prior to the present Act an accounting remained purely an equitable remedy which equity would grant or refuse in its discretion. Dun v. Lumbermen's Credit Ass'n, 209 U. S. 20 (1908); West Publishing Co. v. Edward Thompson Co., 176 Fed. 833 (C. C. A. 2d, 1910). Since the enactment some equity courts have retained the same discretionary powers. Haas v. Feist, 234 Fed. 105 (S. D. N. Y. 1916); Harold Lloyd Corp. v. Witmer, 65 F. (2d) 1, 45 (C. C. A. 9th, 1933). Others have deemed the statutory provisions mandatory. See note 19, *supra*; Caplan, *The Measure of Recovery In Actions For the Infringement of Copyright* (1939) 37 MICH. L. REV. 564, 571.

21. See notes 16 and 19, *supra.*

22. 35 STAT. 1075 (1909), 17 U. S. C. § 25b (1934).

23. The earlier courts generally followed the Eldon principle in patent cases. Elizabeth v. Pavement Co., 97 U. S. 126 (1877). The practice was supplanted by the courts in favor of the more equitable result of estimating what would have been a reasonable royalty for the use of the infringed patent and granting recovery accordingly. Standard Supply Co. v. Cropp Concrete & Mfg. Co., 6 F. (2d) 447 (C. C. A. 7th, 1935). See note 24, *infra.*

attributable to the use of the infringed patent.[24] The approval of this method of computation marked the end of the Eldon principle of no apportionment in patent cases,[25] and the patentee now recovers only the profits actually attributable to the infringement of his patent.

Equally reasonable methods of computation were available in the instant case. The court justifiably ruled out of consideration the value which the plaintiff put upon its copyright in incompleted negotiations with the defendant prior to the infringement;[26] but, relying on expert opinion as suggested in the patent cases, estimated the proper award at the liberal figure of $133,000 — twenty-five per cent of the net return, and on the alternative basis of an eight per cent gross royalty reached an almost identical figure.[27] With the availability of such methods of computation to provide a fair approximation of the correct recovery, the whole basis for Eldon's rule disappears as it did in the patent cases.[28] In any such estimate there is of course an unavoidable element of speculation; but this is more than compensated by the removal of the vicious penalty of wholesale confiscation of profits for relatively small infringements — a procedure just as inequitable as would be the denial of all remedy to the copyright owner.

It would seem that the language of the present Act, in providing for an award of the profits "due to the infringement", contemplates some method of apportionment. But the fact that the court, despite the availability of adequate means of computing a fair recovery, felt bound to follow the old rule, provides a striking illustration of the state to which the terms of the Act have been reduced by inconsistent judicial interpretation. The case offers

24. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641 (1915); Cincinnati Car Co. v. N. Y. Rapid Transit Co., 66 F. (2d) 592 (C. C. A. 2d, 1933). See generally Duke, *Trial of Patent Proceedings In Open Court* (1922) 36 HARV. L. REV. 33; (1928) 41 HARV. L. REV. 906; 3 WALKER, PATENTS (Deller's Ed. 1937) § 821 *et seq.*

25. The practice thus established by the courts has since been incorporated in the Patent Act. 42 STAT. 392 (1922), 35 U. S. C. § 70 (1934). In the trademark and unfair competition cases, however, judicial reluctance to speculate is still apparent and the Eldon principle still applies despite the patent precedents. Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251 (1916); Dickinson v. O. & W. Thum Co., 8 F. (2d) 570 (C. C. A. 6th, 1925). See generally NIMS, UNFAIR COMPETITION AND TRADE MARKS (3d ed. 1929) § 420 *et seq.*

26. Although the $30,000 figure for which plaintiff was willing to sell the motion picture rights, is of interest in comparison with the far greater amount actually awarded, it is of no assistance in determining the "profits made from the infringement." L. C. Page & Co. v. Fox Film Corp., 83 F. (2d) 196 (C. C. A. 2d, 1936). But *cf.* Paramore v. Mack Sennet, Inc., 9 F. (2d) 66 (S. D. Cal. 1925).

27. The eight per cent gross royalty method conforms to the prescribed patent practice. 72 STAT. 392 (1922), 35 U. S. C. § 70 (1934). See note 23, *supra.*

28. It was the absence of any reasonable, fixed formula by which the court could determine accurately the actual contribution that the plaintiff's copyright made to the total profits derived that led to the adoption of the Eldon principle. With an accepted method available there is little justification for retention of the old rule. England has long since rejected it. See John Lane, Ltd. v. Associated Newspapers, Ltd., [1936] 1 K. B. 715; Caplan, *The Measure of Recovery In Actions For the Infringment of Copyright* (1939) 37 MICH. L. REV. 564, 571.

strong justification for the proposed revision of our copyright laws by the Duffy Bill,[29] now pending before Congress. The proposed legislation would effectively avoid the present anomalous result. It provides that in an action for the recovery of profits made from an infringement, the copyright owner shall be permitted to recover all or only such profits "as the court shall decree to be just and proper."[30] While specific statutory authority to apportion profits, on a basis similar to that provided in the Patent Act, might be advisable to insure against the sort of judicial emasculation to which Section 25 has been subjected, still the authority conferred by the Bill in its present form seems sufficiently unambiguous to vest in the courts power to adopt their own reasonable methods of apportionment, and should afford an adequate answer to the instant court's hope that it would be reversed in favor of the more equitable rule of the patent cases.

## A NEW LIMITATION ON THE SCOPE OF DECLARATORY JUDGMENTS*

ISSUANCE of declaratory judgments in the federal courts rests generally on principles clarified[1] by the Supreme Court in the leading case of *Aetna Life Insurance Company v. Haworth*.[2] If there is a present dispute over existing, specific legal relations upon an established state of facts between parties whose interests are *bona fide*, adverse and substantial, the remedy is generally held available.[3] Nor should its invocation be precluded by the existence of other remedies.[4] Hostile courts persist, however, in compressing the scope of the

29. S. 3047, 74th Cong., 1st Sess. (1935); 79 CONG. REC. 12611 (1935). The Bill represents the latest and most thorough-going revision to be proposed. Comment (1938) 47 YALE L. J. 433; Legis. (1938) 51 HARV. L. REV. 906. A leading innovation is the proposal that the United States join the International Copyright Union, long urged by both producer and user interests. Solberg, *The International Copyright Union* (1926) 36 YALE L. J. 68; Duffy, *International Copyright* (1937) 8 AIR L. REV. 213.

30. S. 7, 75th Cong., 1st Sess. (1937) § 17. Passage of the Bill is temporarily impeded by the concerted opposition of powerful copyright proprietory interests on the ground that it is an "infringers' bill." See brief filed by Mr. Nathan Burkan on behalf of the American Society for Composers, Authors and Publishers, *Hearings, op. cit. supra* note 2 at 1093 *et seq.*; Comment (1938) 47 YALE L. J. 433; Caplan, *The Measure of Recovery In Actions For the Infringment of Copyrights* (1939) 37 MICH. L. REV. 564.

*Ohio Casualty Insurance Co. v. Marr, 98 F. (2d) 973 (C. C. A. 10th, 1938).

1. Considerable conflict exists between federal and state decisions with reference to prerequisites for the issuance of declaratory judgments. See BORCHARD, DECLARATORY JUDGMENTS (1934) 74–82, 149–158.

2. 300 U. S. 227 (1937).

3. Legis. (1936) 49 HARV. L. REV. 1351.

4. Maryland Casualty Co. v. Consumers Finance Service, 101 F. (2d) 514 (C. C. A. 3d, 1938); Columbian National Life Ins. Co. v. Foulke, 89 F. (2d) 261 (C. C. A. 8th, 1937).

declaratory judgment between two limiting theories: on one side, the absence of a controversy in its narrowest sense;[5] on the other, the availability of other remedies.[6] The recent tendency to discredit devices used to expand these limitations has seemed only to father the discovery of new restrictive techniques.[7]

The latest example of the disposition to defeat the Federal Declaratory Judgments Act[8] takes the form of a narrow construction of pleadings by which they were found to disclose no controversy. An insurance company joined the insured and the deceased's administrator as defendants in a suit for judicial declaration of its non-liability upon an automobile accident policy.[9] The insurer's duty to defend the insured was conditioned upon receipt of proper notice of the accident and of subsequent claims. Its prayer for immunity was predicated upon omission of the first notice. Since there was a dispute about whether or not the insured was actually involved in the accident, the petition averred that there was "an alleged accident." This averment was followed by the customary allegations of failure to notify and of controversy over whether the policy was thereby rendered inoperative. The court took the view that, since the duty of the insured to notify depended on the occurrence of an accident, the case turned ultimately on the determination of that fact: in order to create a justiciable controversy, the insurer had to take a definite stand on that issue adverse to the insured. An avowal of "an alleged accident" not only failed to declare facts revealing a breach of contract, but also rendered the insurer's position on the vital issue indistinguishable from that of the insured. The petition was accordingly dismissed as failing to state a cause of action.

This decision, in effect, restricted the company to the alternatives presented by conventional procedure: to defend the insured, or to risk the consequences of a refusal to defend. Since defense would imply waiver of the privilege of maintaining that the policy was inoperative,[10] the employment of that strategy by the insurer would probably be injudicious, for trial of an accident suit to a jury in a state court is notoriously likely to result in a judgment against the insurance company. And even if the latter were to win, it would still have to shoulder the expenses attendant upon the preparation of a negligence suit. Should it refuse to defend, the administrator of the decedent

5. United States Fidelity & Guaranty Co. v. Pierson, 21 F. Supp. 678 (W. D. Ark. 1937); Merchants Mutual Casualty Co. v. Leone, 9 N. E. (2d) 552 (Mass. 1937). But *cf.* Ohio Casualty Insurance Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935).

6. Nesbitt v. Manufacturers Casualty Insurance Co., 310 Pa. 374, 165 Atl. 403 (1933); Wolverine Mutual Motor Insurance Co. v. Clark, 277 Mich. 633, 270 N. W. 167 (1936). *Cf.* Utica Mutual Insurance Co. v. Beers Chevrolet Co., 250 App. Div. 348, 294 N. Y. Supp. 82 (4th Dep't 1937).

7. See BORCHARD, DECLARATORY JUDGMENTS AND INSURANCE LITIGATION, Address before American Bar Ass'n, Section on Insurance Law (July 26, 1938).

8. 48 STAT. 955 (1934), 28 U. S. C. § 400 (1935).

9. Ohio Casualty Insurance Co. v. Marr, 98 F. (2d) 973 (C. C. A. 10th, 1938).

10. Travelers Insurance Co. v. Young, 18 F. Supp. 450 (D. N. J. 1937); Ohio Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Merchants Mutual Casualty Co. v. Pinard, 87 N. H. 473, 183 Atl. 36 (1936). *Contra:* United States Fid. & Guar. Co. v. Savoy Grill, 51 Ohio App. 504, 1 N. E. (2d) 946 (1936).

would doubtless press the suit against the insured to judgment. A judgment for the administrator would then foster a suit against the insurance company.[11] Only after all these events had occurred would the company have an opportunity to litigate the issue of the "coverage" of the policy, an issue upon which a finding made before the negligence suit would obviously have been more advantageous for all parties concerned. A judgment in favor of the insured, on the other hand, would expunge the administrator's derivative right of action against the insurer.[12] But such a decision might prove even more dangerous to the insurance company: if the insured should win the first suit by proving his non-participation in the accident, the insurer would then be exposed to a suit for breach of its duty to defend.[13]

When possible tactics are considered in the light of the company's objectives, it becomes evident that the method actually chosen was the logical one for achievement of those aims. The primary purpose of the company was obviously to establish its own non-liability. But in order to maintain the business prestige inherent in the preservation of the insured's good will, the company doubtless desired to extricate him along with itself. These ends could be achieved most effectively by combining within a single suit the insured's defense of "no accident" and the company's claim that the policy was inoperative. While no such feat could be achieved under conventional procedure, it seemed easily effected by a petition for a declaratory judgment; and in thus taking the offensive, the insurance company gained the further advantage of choice of forum.[14]

Had the company, in taking this step, followed the court's suggestion and alleged that there was an accident, it would have lost the full benefits of the remedy sought,[15] for a finding that there was an accident would presage a declaration of the insurer's immunity, thus defeating the company's second objective—the retention of the insured's good will. Nor would an opposite finding—that there was no accident—operate definitely to preclude further litigation of the matter, despite the implication that the administrator had no

11. Where the insurance company denies coverage it is impossible to avoid two suits, for the administrator cannot join the insurance company until the coverage issue is settled. Fanslau v. Rogan, 194 Wis. 8, 215 N. W. 589 (1927).

12. Merchants Mutual Casualty Co. v. Leone, 9 N. E. (2d) 552 (Mass. 1937).

13. The policy required the insurance company to defend all claims, whether groundless or not. See Ohio Casualty Insurance Co. v. Marr, 98 F. (2d) 973, 974 (C. C. A. 10th, 1938).

14. Federal courts formerly had the reputation of being more liberal toward insurance companies; but there may be less basis for this now in light of Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938).

15. The insurer might have alleged "no accident," in the hope of successfully terminating all litigation by establishment of that fact. Although this raises no issue between insurer and insured, it precipitates a controversy between insurer and administrator. But it fails to throw into dispute the fundamental question of whether the insurer's duty to perform under the policy has arisen, for the latter can raise that issue only by taking a position adverse to the insured. The issue with the administrator is immaterial; his rights in the policy are derived from those of the insured. Merchants Mutual Casualty Co. v. Leone, 9 N. E. (2d) 552 (Mass. 1937). Furthermore, interests of comity between state and federal courts would militate against acceptance of jurisdiction. See Maryland Casualty Co. v. Consumers Finance Service, 101 F. (2d) 514, 515 (C. C. A. 3d, 1938).

cause of action. Since the insurer's claim of an accident would be in accord with the administrator's contention on that point, the issue would not be litigated between them.[16] There is grave doubt, accordingly, as to whether a finding on this question could subsequently be used by the insurer as *res judicata* against the administrator.[17] The confusion thus created might result in a holding that the insurance company was liable on the ground of "no accident" in this first suit and of "accident" in the subsequent tort action.

In contrast with such devious courses as those outlined above stands the proposition that the petition presented in the principal case should have been admitted. The court could reasonably have concluded, under the circumstances, that the words "an alleged accident" amounted to permissible alternative pleading,[18] recognizing the company's point that determination of the issue either way would result in the same judicial declaration. Sufficient latitude would have been granted to what was in reality a triangular, rather than a two-sided, dispute. The real adversaries on the accident issue, insured and administrator, would then necessarily litigate the question of the insured's part in the accident and the former would have full opportunity to present his defense of "no accident" without jeopardizing the insurance company's rights. Failure of this defense would leave the insured exposed to a suit on the issue of negligence, but would absolve the insurer from duty to defend because of the failure of notification. A decision that the insured took no part in the accident would be *res judicata* against the administrator and would therefore conclude all litigation of the matter.[19] In either event, the court would, then and there, be compelled to declare that the company was not liable.[20]

16. In suits testing the extent of the policy's coverage, insurer and insured are the real parties of interest. The administrator's only interest is derived through the insured. Auto Mutual Indemnity Co. v. DuPont, 21 F. Supp. 606 (D. Del. 1937).

17. *Res judicata* is ordinarily invoked to enable a party to a suit to prevent his adversary from reopening the issue in another action. Behind this lies the theory that the opponent was presented with an adequate opportunity to litigate the issue in the first suit. Ohio Casualty Insurance Co. v. Gordon, 95 F. (2d) 605 (C. C. A. 10th, 1938); *cf.* Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N. E. (2d) 758 (1937). An attempt to fit this rationale to the anomalous situation disclosed in the principal case results in confusion, for the administrator and the insurer are only nominally adverse on what the court concedes to be the vital issue. In order to obtain a declaration that the policy is operative, a finding of "no accident" must be made. Nevertheless, the administrator cannot urge this contention, for it might estop him from founding the subsequent tort action against the insured on the claim that there was an accident. Consequently, the suit for declaratory judgment gives him no opportunity to present his case and should not be used to bar him in a subsequent suit. *Cf.* Maryland Casualty Co. v. Consumers Finance Service, 23 F. Supp. 433, 434 (M. D. Pa. 1938).

18. Aiken Mills v. Boss Mfg. Co., 65 F. (2d) 344 (C. C. A. 2d, 1933); Reeve v. Cromwell, 237 N. Y. Supp. 20, 227 App. Div. 32 (1st Dep't 1929).

19. The insurance company, even though not an adversary on this issue, can use the finding as *res judicata* because its liability is derived from that of the insured. Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N. E. (2d) 758 (1937); Coca Cola v. Pepsi-Cola Corp., 36 Del. 124, 172 Atl. 260 (1934).

20. It is conceivable, of course, that the policy could be declared operative without a finding on the accident issue, in which case it would be possible to hold the insurance company liable for the defense of the tort action even under an equivocal allegation.

The court was unquestionably correct in declaring that the decision had to rest on a finding of the existence or non-existence of an accident. It seems no less obvious, however, that when the fact of the accident is itself disputed, the problem of the insurance company's legal relations presents a valid controversy capable of final adjudication.[21] Accordingly, while the court's deduction that the insurance company had to select one side of that issue was permissible, its conclusion was by no means inevitable. The decision is technically correct; but the fact that the company was entitled to be released under either alternative seems to call for the adoption of a somewhat broader view of the controversy.

Denial of the remedy in the instant case may have been influenced by the unusual situation which enabled the insurance company to plead existence of an accident in the declaratory judgment suit and, if unsuccessful, to plead non-existence of the accident as a part of the defense in the tort action. Permission to enhance this already favorable position by a combination of the two theories in one suit by equivocal allegation may have struck the court as an arrangement unduly favorable to the insurance company. By requiring the company to choose one side of the accident issue, the court could at least preserve the possibility that the insurer's resources would remain available to the insured and the administrator. It is more likely, however, that the remedy was withheld on the more fundamental bases of disapproval of "coverage" defenses[22] and desire to discourage the conversion of the Declaratory Judgments Act into a removal statute.[23]

The decision will probably strengthen two fronts: restriction of "coverage" defenses and limitation of the scope of declaratory judgments. The fact that the defense was one which would be unavailable in the tort suit in the state court eliminates the possibility of federal encroachment on state jurisdiction, rendering arguments of comity inapplicable.[24] An objective evaluation of the case must depend, then, upon balancing the well known views of exponents of the declaratory judgment against the equally familiar arguments advanced by those who feel insurers should be denied refuge in technicalities. Although analysis of these arguments would lead only to a stalemate, it is extremely questionable whether, in general, the desire to handicap insurance companies should take precedence over the maintenance of a readily accessible judiciary. The fact that the declaratory judgment has been heralded as a procedure by which a party may conclude ordinarily multiple litigation in a single suit[25] seems to indicate application rather than denial of the remedy in such situations as that of the instant case.

21. See Maryland Casualty Co. v. Hubbard & Employers Liability Assurance Co., 22 F. Supp. 697, 699 (S. D. Cal. 1938); BORCHARD, DECLARATORY JUDGMENTS (1934) 36.

22. See BORCHARD, DECLARATORY JUDGMENTS AND INSURANCE LITIGATION, Address before American Bar Ass'n, Section on Insurance Law (July 26, 1938).

23. The latter finds expression in comity arguments, which provide a valid basis for denying federal jurisdiction where the identical issues are pending in a state suit, and where no litigation will be avoided by the declaratory judgment or where the petition is merely an attempt to try various defenses piecemeal instead of in a single suit. Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321 (C. C. A. 4th, 1937); American Motorists Insurance Co. v. Busch, 22 F. Supp. 72 (S. D. Cal. 1938); Maryland Casualty Co. v. Consumers Finance Service, 101 F. (2d) 514 (C. C. A. 3d, 1938).

24. See note 23, *supra*.

25. Comment (1936) 46 YALE L. J. 286.

# TAXATION OF COMPROMISE AGREEMENTS AS SALE OR EXCHANGE OF CAPITAL ASSETS*

IN DETERMINING to what extent income is subject to taxation, Congress has permitted the taxpayer to deduct in full from his gross income both bad debts[1] and the ordinary losses sustained in transactions entered into for profit.[2] However, when a loss is sustained on the sale or exchange of capital assets, the Revenue Act[3] prescribes a method of computation having less factual connection with the increase or decrease of the actual capital net worth of the taxpayer within the taxable year.[4] The right to claim a deduction of such capital losses is severely curtailed for the two-fold purpose of increasing the revenues of the Federal Government and discouraging speculative transactions.[5] Though it would seem reasonably simple to distinguish a bad debt or an ordinary loss from a capital loss resulting from the sale or exchange of capital assets, a possible difficulty may arise in drawing the line between the two in a transaction which has attained importance because of its frequency—the compromise of a debt with an impecunious debtor.

This problem is raised in a recent decision of the Board of Tax Appeals.[6] The owner of real estate in Florida had sold his land in 1926 for five hundred thousand dollars, receiving payment partly in cash and partly in promissory notes secured by a mortgage on the property sold. At that time the vendor reported the entire amount of his profit from this transaction and taxes were duly paid thereon. Afterwards the purchaser defaulted on the notes, and, being unable to live up to his obligation, agreed with the vendor to reconvey the land in consideration of the cancellation of his notes for about three hundred and six thousand dollars. At the time of the reconveyance in 1932 the property had a market value of two hundred and forty-two thousand dollars. The vendor claimed to be entitled to deduct the unsatisfied balance of his claim as a bad debt or in the alternative as an ordinary loss. The Board, however, followed the contention of the Commissioner and decided that the transaction was a sale or exchange of the land for the notes and the mortgage, and as such it was deductible only in accordance with the capital gain and loss provisions of the Act of 1932.[7]

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*Harry Payne Bingham, 38 B. T. A. 913 (1938).

1. INTERNAL REVENUE ACT § 23 (k) (1), 52 STAT. 460 (1938), 26 U. S. C. A. § 23 (k) (1) (Supp. 1938).

2. INTERNAL REVENUE ACT § 23 (e) (2), 52 STAT. 460 (1938), 26 U. S. C. A. § 23 (e) (2) (Supp. 1938).

3. INTERNAL REVENUE ACT § 117, 52 STAT. 500 (1938), 26 U. S. C. A. § 101 (Supp. 1938).

4. *Cf.* Hendricks, *Federal Income Tax: Capital Gains and Losses* (1935) 49 HARV. L. REV. 262, 281.

5. See 2 PAUL AND MERTENS, THE LAW OF FEDERAL INCOME TAXATION (1934) § 19.03; Comment (1937) 32 ILL. L. REV. 189, 195.

6. Harry Payne Bingham, 38 B. T. A. 913 (1938).

7. In view of the provisions of the Act of 1932 [INTERNAL REVENUE ACT § 101, 47 STAT. 191 (1932)] the result here reached is not inequitable since it leaves the taxpayer where he would have been, had the original contract called for a purchase price equal to the sum actually received. The principal case, however, is not based on this fact at all, nor is it limited in its application to cases arising under the Act of 1932.

While the Revenue Act itself does not contain any specific provisions concerning the problem under discussion, regulations under the Act expressly provide for the treatment of similar losses sustained by mortgagees.[8] If in the case of the mortgagor's default the mortgagee forecloses on the property and the proceeds of the judicial sale do not satisfy his claim, he may deduct as a bad debt any uncollectible deficiency. If the mortgagee acquires the property at foreclosure sale he may charge off as a bad debt, when uncollectible, the excess of his total claim over the part of the obligation applied to the bid price.[9] The present case would seem closely analogous—differing only in the absence of judicial proceedings—to the situation of a mortgagee who purchases property pledged to him at foreclosure for an amount equal to the market value of such property and then finds the balance of his claim to be uncollectible. The conclusive presumption established by the Board in the principal case and the Bureau in a prior ruling[10] that the mortgagee who accepts in full satisfaction title to the property mortgaged to him is thereby applying his total claim to its purchase is without foundation.[11] Such a view appears to be irreconcilable with the accepted holding that in the case of a voluntary conveyance of property—as distinguished from judicial sale—the fair market value of the property determines the question of a realization of taxable income.[12]

8. U. S. Treas. Reg. 101, Art. 23(k)-3.

9. These regulations have now been supplemented by recent Bureau Rulings [I. T. 3121, XVI-2 CUM. BULL. 138 (1937); I. T. 3159, XVII-1 CUM. BULL. 188 (1938)] to the effect that the mortgagee may claim a capital loss measured by the difference between the market value of the property and the basis of the obligation of the debtor applied to the bid price. In case the mortgagee purchases the property at foreclosure for an amount equal to his total claim or in case he accepts a voluntary conveyance of the property in full satisfaction, the ruling concedes only the deduction of a capital loss measured by the difference between the market value of the property and the bid price, thus depriving the mortgagee of any opportunity to claim a bad debt deduction. The ruling seems of doubtful validity in view of the holding of the United States Supreme Court in Helvering v. Midland Mut. Life Ins. Co., 300 U. S. 216 (1937), (1937) 46 YALE L. J. 1406 that the bid price conclusively fixes the value of the property for income tax purposes. And recently the case of Hadley Falls Trust Co. v. United States, 22 F. Supp. 346 (D. Mass. 1938) squarely disregarded I. T. 3121, *supra*, by holding that the mortgagee who purchases property at foreclosure does not sustain any loss until he disposes of the property. If the part of the ruling applicable to the taxation of mortgagees after foreclosure is disregarded by the courts, the provisions concerning the treatment of compromise agreements will fall simultaneously.

10. J. T. 3121, XVI-2 CUM. BULL. 138 (1937).

11. See PAUL AND MERTENS, *op. cit. supra* note 5 at § 19.31, n. 11d (Supp. 1938) criticizing the inconsistency of the ruling.

12. If a mortgagee purchases at foreclosure property for an amount equal to his claim for principal and interest, he is subject to income tax for the interest even if the market value of the property is less than the principal of the debt. Helvering v. Midland Mut. Life Ins. Co., 300 U. S. 216, 108 A. L. R. 441 (1937). But if he accepts property voluntarily conveyed to him in full satisfaction, he may show that in view of the market value of the property he did not receive satisfaction for his claim for interest. Helvering v. Missouri State Life Ins. Co., 78 F. (2d) 778 (C. C. A. 8th, 1934), (1937) 15 CHI-KENT REV. 240.

The Board contends, however, that an agreement to accept property in satisfaction of an existing indebtedness is a sale or exchange of the debtor's notes for the property and not a payment of the notes by the transfer of property.[13] Consequently the mortgagee is deemed to have sustained merely a capital loss measured by the difference between the market value of the property and the amount of his claim. To support its position the Board relies on a holding to the effect that the *mortgagor* who transfers assets to a creditor to satisfy an obligation calling for cash payment sells or exchanges such property for his notes.[14] Obviously such a transaction constitutes an exchange from the mortgagor's standpoint, since he receives a discharge from his obligation in consideration of a conveyance of assets of less value.[15] However, to find an exchange in the principal case the Board must rely on the highly technical argument that the mortgagee receives new consideration for his release of the debtor from his obligation to pay a larger sum of money, the consideration taking the form of a conveyance of the property already mortgaged to him and a release of the mortgagor's right to redeem such property.

Though it is possible to support the Treasury's view on tenuous legalistic grounds, the result is inconsistent with the well established rule that a creditor may apply assets pledged or conveyed to him in *partial* satisfaction of his claim without the transaction being regarded as an exchange of such property for a part of the debtor's obligation.[16] The Department, moreover, admits that a creditor who accepts in *full* satisfaction a cash settlement is not thereby exchanging the debtor's notes or parts of them for the cash received.[17] Nor is the acceptance of notes issued by a subsidiary of the debtor in satisfaction of a claim against the latter considered a sale or exchange.[18] It would be more consistent with these holdings if the Bureau would abandon its technical position in the instant case, and instead rule

13. To the same effect is another recent ruling of the Bureau applicable to a conveyance of title of securities already pledged to the creditor to him by way of compromise. I. T. 3167, XVII-1 CUM. BULL. 190 (1938).

14. Betty Rogers, 37 B. T. A. 897 (1938). If this decision is compared, however, with the cases of C. Griffith Warfield, 38 B. T. A. 907 (1938) and H. L. Rust, 38 B. T. A. 910 (1938), it will also appear that in the treatment of the mortgagor's losses the holdings of the Board are inconsistent.

15. The mortgagor in this case would, if solvent, realize taxable income. L. D. Coddon & Bros., Inc., 38 B. T. A., Feb. 23, 1938; *cf.* Dallas Transfer & Term. Warehouse Co. v. Commissioner of Internal Revenue, 70 F. (2d) 95 (C. C. A. 5th, 1934).

16. Southern Calif. Box Co. v. United States, 46 F. (2d) 724 (Ct. Cl. 1931); Commissioner of Internal Revenue v. Wilson, 90 F. (2d) 788 (C. C. A. 7th, 1937); Sunflower Packing Corp., 2 B. T. A. 1104 (1925); Cornelius Lumber Co., 5 B. T. A. 215 (1926); Kansas City Pump Co., 6 B. T. A. 938 (1927); Harold S. Denniston, 37 B. T. A. 834 (1938) (holding that even the acceptance of H. O. L. C. bonds in partial satisfaction of an indebtedness does not constitute a sale or exchange, despite the holding in Josephine C. Bowen, 37 B. T. A. 412 (1938) to the effect that the acceptance of H. O. L. C. bonds in full satisfaction is to be treated as such a sale or exchange).

17. I. T. 3121, XVI-2 CUM. BULL. 138 (1937); Hale v. Helvering, 85 F. (2d) 819 (App. D. C. 1936).

18. Charles T. Carlson, 39 B. T. A., Jan. 24, 1939. *Cf.* Old Colony Trust Co. v. Commissioner of Int. Rev., 59 F. (2d) 168 (C. C. A. 1st, 1932).

that a creditor who accepts in *full* satisfaction a conveyance of property does not exchange the debtor's notes for such property but cancels them. For the creditor is not really receiving a new consideration in such a case; rather, the parties are merely dispensing with the formality of a judicial sale.[19] It should be immaterial for the legal construction of a transaction to determine whether or not an obligation is satisfied by the payment of money or the conveyance of property.

Morever, the Board's position appears to lack a substantiating policy. For in order to avoid the result reached in the principal case, the parties may simply resort to the practice of having the mortgagor sell the property to an outsider and then turn over the proceeds to the mortgagee. Thus if the mortgagee should ascertain the balance of his claim to be uncollectible, he could charge it off as a bad debt.[20] Yet there would seem to be little reason for encouraging this procedure as it would only result in a sacrifice sale of the property, thereby causing increased loss to the mortgagee and consequently to the government. And since, without more, the payment of a smaller sum does not constitute good consideration for a discharge of the debtor from his obligation to pay a larger amount,[21] the mortgagor may often be reluctant to reach such an agreement. Unable to attain a friendly settlement, judicial proceedings and foreclosure will be the only alternative by which the mortgagee may deduct in full any deficiency.[22] It seems unreasonable to encourage litigation in this way, and to reduce the mortgagee's recovery by the added administrative expenses of foreclosure sale and deficiency judgment. Moreover, these costs are deductible in full, so the final result would be a reduction rather than an increase of the federal revenues.[23]

Finally, the sale of property and subsequent attempt of the vendor to minimize the loss arising from the vendee's inability to pay, taken as a whole, presents a single rather than two separate transactions.[24] And as such, it is

19. See the dissent by Smith, member, in the instant case. Harry Payne Bingham, 38 B. T. A. 913 (1938). It is not necessary that the taxpayer obtain a deficiency judgment in order that he be entitled to claim deduction for worthless debts. Though a voluntary discharge will not do [American Felt Co. v. Burnet, 58 F. (2d) 530 (App. D. C. 1930)] a charge-off is sufficient if sound business judgment indicates that a claim is uncollectible. United States v. White Dental Mfg. Co., 274 U. S. 398 (1927); Deeds v. Commissioner of Int. Rev., 47 F. (2d) 695 (C. C. A. 6th, 1931); Ruppert v. United States, 22 F. Supp. 428 (Ct. Cl. 1938).

20. *Cf.* Hale v. Helvering, 85 F. (2d) 819 (App. D. C. 1936).

21. ANSON, CONTRACTS (Corbin's ed. 1930) § 140.

22. U. S. Treas. Reg. 101, Art. 23(k)-3.

23. Edward S. Phillips, 9 B. T. A. 1016 (1927).

24. Though the provisions applicable to bad debts and ordinary losses have been held to be mutually exclusive [Spring City Foundry v. Commissioner of Internal Revenue, 292 U. S. 182 (1934)] the taxpayer's claim for deduction can be sustained under either provision. The taxpayer may possibly treat the compromise as a completed transaction giving rise to a *loss,* in view of the actual inability of the mortgagor to pay the balance, despite the fact that the loss stems from an uncollectible *debt.* Sunflower Packing Co., 2 B. T. A. 1104 (1925); First National Bank of Durant, 6 B. T. A. 545 (1927). Or on the other hand he may claim deduction under the bad debt provisions if the debt is ascertained to be worthless and charged off at least simultaneously with the cancellation agreement, for after the cancellation no charge-off is possible since the debt has

a normal business procedure, definitely not falling within the scope of the disfavored speculative deals which Congress has subjected to drastic taxation.[25] The instant decision has little to be said in its favor; by a highly technical process of reasoning it reaches a result contrary to public policy.[26]

## CONTRIBUTION BETWEEN MORTGAGEES*

PRINCIPLES, not precedents, should be the primary concern of a court of equity. Contribution rests on the principle that where a group of persons is subject to a common obligation which none has the prior duty to discharge, one of the group who inofficiously discharges more than his proportionate share is entitled to ratable reimbursement from the others.[1] In certain common situations the application of this principle is well settled; among cosureties,[2] joint principal debtors,[3] and increasingly among joint tort-feasors,[4]

ceased to exist. Deeds v. Commissioner of Int. Rev., 47 F. (2d) 695 (C. C. A. 6th, 1931); Schuh Drug Co. v. United States, 49 F. (2d) 644 (E. D. Ill. 1931); *cf.* Brown v. United States, 95 F. (2d) 487 (C. C. A. 3d, 1938); 3 PAUL AND MERTENS, *op. cit. supra* note 5, at §§ 26.46, 28.09.

25. Since payment of an obligation does not constitute a sale or exchange Congress had to enact specific provisions in order to tax holders of bonds redeemed before maturity. Internal Revenue Act § 117 (f), 48 STAT. 714 (1934), 26 U. S. C. § 101(f) (1934); *cf.* Felin v. Kyle, 22 F. Supp. 556 (E. D. Pa. 1938); John H. Watson, Jr., 27 B. T. A. 463 (1932). And in order to deprive the holders of worthless "securities" of their right to claim a bad debt deduction, it was necessary to insert in the Act of 1938 a specific provision to this effect. Revenue Act § 23(k)(2), 52 STAT. 460 (1938), 26 U. S. C. A. § 23(k)(2) (Supp. 1938). This shows clearly that it was not intended to regard transactions between creditor and non-corporate debtor as falling within the scope of the capital gain and loss provisions.

26. The principal holding would also cause great injustice in view of the fact that a taxpayer who receives in full satisfaction of a claim property of less value may only deduct a small percentage of his loss while he would be held to have realized a taxable gain if immediately after its acquisition he sells the property to a third party for an amount equal to his original claim. See MONTGOMERY, FEDERAL INCOME TAX HANDBOOK (1935) 540.

* Snyder v. Elkan, 199 S. E. 891 (Ga. 1938).

1. Fidelity & Casualty Ins. Co. v. Sears, Roebuck & Co., 124 Conn. 227, 199 Atl. 93 (1938); Houston v. Bain, 170 Va. 378, 196 S. E. 657 (1938); 4 POMEROY'S EQUITY JURISPRUDENCE (4th ed. 1918) § 1418; 2 STORY'S EQUITY JURISPRUDENCE (14th ed. 1918) § 648; RESTATEMENT, RESTITUTION (1937) § 81.

2. See Comment (1931) 6 NOTRE DAME LAWY. 369; 2 STORY'S EQUITY JURISPRUDENCE § 669 *et seq.* Statutory provisions are common. *E.g.*, IND. STAT. ANN. (Burns, 1933) § 3-2506.

3. Carter v. Lechty, 72 F. (2d) 320 (C. C. A. 8th, 1934), with extensive citations at 322; Quintin v. Magnant, 285 Mass. 450, 189 N. E. 209 (1934); Hanson, *Contribution Between Multiple Codebtors* (1937) 86 U. OF PA. L. REV. 25.

4. The common law policy against adjusting equities between wrongdoers is disregarded where the nature of the wrong permits: RESTATEMENT, RESTITUTION (1937) §§ 99-102; or by statute: *e.g.*, N. Y. CIV. PRAC. ACT § 211a. Gregory, *Tort Contribution Practice in N. Y.* (1935) 20 CORN. L. Q. 269.

contribution is quite generally granted. A recent case,[5] however, illustrates an occasional hesitancy in the courts to extend the settled rules to a less usual situation.

Three pieces of property, mortgaged to three separate mortgagees, were the only holdings of the mortgagor, who became insolvent and was unable to pay the taxes on any of them. Under an unusual Georgia statute, whereby delinquent taxes on a piece of property became a prior lien upon *all* of the taxpayer's real estate,[6] the county took execution on a single piece for the taxes due on all three and purchased a tax deed on the parcel for the aggregate sum of the taxes. Failing in an attempt to set the sale aside, the mortgagee who had thus lost his security recovered *in personam* judgments against the other two mortgagees for contribution of proportionate shares of the tax liens discharged. The appellate tribunal reversed the decrees on defects of pleading,[7] but not resting its decision solely on such defects, denied the application of the remedy of contribution in this situation on the ground that there was "no joint or common liability as between (the plaintiff) and the other creditors, to be discharged by him in behalf of all." In reaching this conclusion, the court may have been influenced by certain differences between the situation in the instant case and that in the more common examples of contribution. Between co-sureties, for example, there is a close personal relationship, arising out of contractual participation in a common enterprise, which makes fairly evident the "reciprocal rights and duties" which the court was unable to discover in the instant case. Similarly, where the common burden involved is incident to the ownership of property, such a relationship is generally found in privity of title in the parcel—the privity, for example, between tenants in common or life tenant and remainderman.[8] But however usual they may be, neither a close personal relationship

5. Snyder v. Elkan, 199 S. E. 891 (Ga. 1938). *On demurrer*, Bibb County v. Elkan, 184 Ga. 520, 192 S. E. 7 (1937).

6. GA. CODE (1933) § 92-5708; see *In re* Rogers & Williams, 3 F. Supp. 116, 117 (S. D. Ga. 1933). Almost universally, however, the real estate tax lien on each tract of land is for the taxes against such tract only. 3 COOLEY, TAXATION (4th ed. 1924) § 1236. Personal property taxes sometimes become a prior lien upon all the owner's real estate. (1929) 42 HARV. L. REV. 961.

7. The court said that since under GA. CODE (1933) § 92-5712 the plaintiff might have released his property by payment of its proportionate share of the tax lien, discharge of the entire burden by execution did not appear compulsory. This apparent officiousness was due to a mere pleading defect—the failure properly to allege lack of notice of the sale as the cause of the plaintiff's failure to pursue this remedy. Further, unless all equitable relief is to be denied for lack of diligence, failure to make actual payment under this provision should not render loss of the property so officious or "voluntary" as to preclude contribution. See (1935) 45 YALE L. J. 151, n. 20. But *cf. In re* Lohr's Estate, 200 Atl. 135 (Pa. Super. Ct. 1938), construing PA. STAT. (Purdon, 1936) tit. 72, §§ 5968, 5969 to make the payor a volunteer.

8. Between tenants in common or joint tenants: RESTATEMENT, RESTITUTION (1937) § 105, comments *a, b*; *cf.* Jamison v. Cotton, 136 Cal. App. 127, 28 P. (2d) 39 (1933). Between life tenant and remainderman: 3 POMEROY'S EQUITY JURISPRUDENCE § 1223. To a lesser degree this "privity" is present between persons taking property from a common source and subject to a debt arising therefrom. An heir or legatee paying the debt of the common ancestor may obtain contribution from his co-heirs, Camp-

in contract cases, nor privity in the same parcel in property cases, is essential to contribution relief.[9] For instance, where securities have been validly but wrongfully pledged by a broker so that all are subject in common to his debt, and some of them survive a sale by the pledgee in satisfaction of the debt, those whose securities were sold are entitled to contribution from the owners of the surviving securities despite the absence of any sort of privity between the various security holders.[10] The only relationship essential to contribution is that the parties involved, or in cases incident to property, the property interests involved, be equally[11] subject to a common burden.

The instant case differs from more familiar examples of contribution not only in the type of relationship, but also in the type of obligation involved. Unlike co-sureties, the mortgagees here have in no way personally bound themselves to discharge the common debt: the only claim of the county was upon the mortgaged land itself. The court was therefore quite correct in reversing the *in personam* decrees.[12] But the absence of personal liability does not preclude a remedy; it merely changes its form from an *in personam* to an *in rem* decree. Such a decree, for instance, may properly be awarded against a piece of property subject, with other parcels, to a common mortgage subsequently discharged in full by the owner of one of the other parcels, although the grantee of the delinquent parcel has not personally assumed the mortgage debt.[13] For in that situation, as in the instant case, the

bell v. Lederer Realty Corp., 136 Atl. 248 (R. I. 1927), *aff'd*, 136 Atl. 926 (1927). Stockholder-distributee of dissolved corporation, paying tax deficiency, was entitled to contribution from the other stockholders. Phillips-Jones Corp. v. Parmley, 302 U. S. 233 (1937); (1937) 47 YALE L. J. 143.

9. "In the exercise of this jurisdiction courts in no way regard the existence of a contractual relation as material, and privity between the parties is not essential. Though the substantive basis of the assumed obligation is occasionally referred to as '*quasi*-contractual,' and though privity is sometimes spoken of as an element, it is thoroughly well settled that the contract is a fiction and the privity such as the law itself creates from the mere discharge of the obligation." 2 LAWRENCE ON EQUITY JURISPRUDENCE (1929) § 739.

10. Asylum of St. Vincent de Paul v. McGuire, 239 N. Y. 375, 146 N. E. 632, 38 A. L. R. 1219 (1925), holding that "The right to contribute here invoked is not dependent on contract, or joint action, or original relationship between the parties." *Contra:* Palley v. Worcester County National Bank, 290 Mass. 501, 195 N. E. 717 (1935) (minority rule). See Note (1932) 76 A. L. R. 794.

11. In the instant case the tax lien attached subsequent to conveyance of all the mortgage interests, hence they were equally liable for it. When properties of a debtor *already* liable as security for his debt are conveyed simultaneously, they are likewise equally subject to the burden. But when conveyed successively they are liable in the inverse order of alienation, since presumably the debtor intended after each conveyance that the debt be satisfied out of his remaining properties. Hence contribution is not available. Fidelity & Casualty Co. of N. Y. v. Mass. Mutual Life Ins. Co., 74 F. (2d) 881 (C. C. A. 4th, 1935); Clark v. Monroe County Bank, 33 Ga. App. 81, 125 S. E. 603 (1924); GA. CODE (1933) § 39-118; 3 JONES ON MORTGAGES (8th ed. 1928) §§ 2034-2038.

12. RESTATEMENT, RESTITUTION (1937) § 104, comment *a*; *cf.* Wood v. Scott, 48 S. W. (2d) 1024 (Tex. Civ. App. 1932).

13. 2 JONES ON MORTGAGES (8th ed. 1928) § 1393. Provided, of course, the owner discharging the mortgage debt had not himself assumed it. *Id.* § 1394. *Cf.* Lach v. Weber, 123 N. J. Eq. 303, 197 Atl. 417 (Ch. 1938); Wood v. Scott, 48 S. W. (2d) 1024 (Tex. Civ. App. 1932).

various parcels of land, since they are equally subject to execution to pay the mortgage or tax debt owed by the common mortgagor, become in effect impersonal co-sureties[14] for its discharge; and except for the difference in the nature of the decree, the principles governing contribution between co-sureties apply. When one parcel has discharged the common debt by going into execution, it acquires, through subrogation[15] to the rights of the original creditor who took the execution, a right of contribution against the other "co-surety" parcels.

Where, however, the right of contribution lies in a piece of property, it becomes essential to determine who can enforce the right. Under settled principles, where one holding an interest in a parcel makes an actual payment of more than that parcel's *pro rata* share of the common debt, either to protect it from execution or to redeem[16] it subsequently, the payor is entitled to the decrees of contribution against the other "co-surety" parcels. By analogy it seems apparent that where, as in the instant case, the property itself has gone in execution with no subsequent redemption, those interested in the parcel—whether first or second mortgagees, pledgees, tax or judgment lienholders, or residual owners—have, through the sacrifice of their interests, in effect "paid" the debt.[17] They should therefore be entitled to enforce the parcel's right of contribution, dividing the proceeds of the action according to the priority of their interests.

Similarly, those holding interests in the "co-surety" parcels are proper parties defendant in a suit for contribution by those with interests in the parcel on which execution has been taken. Any of these potential defendants has the privilege, though none has the duty, to forestall the execution, in such a suit, against the parcel in which he is interested, by paying in advance himself its *pro rata* share of the common burden discharged by the plaintiff.[18]

14. The analogy of impersonal co-suretyship is not a new one. See Comment (1925) 35 YALE L. J. 92. *Cf.* RESTATEMENT, RESTITUTION (1937) § 103, comment *d.*

15. See (1939) 48 YALE L. J. 683; SHELDON ON SUBROGATION (2d ed. 1893) § 1. Without subrogation to the priorities of the county's tax lien in the instant case, the plaintiff's contribution claim against the properties would have no priority over the defendants' mortgages. On the other hand, where in a like situation the plaintiff purchased all the tax liens and sought to enforce them in full against the other mortgagee, his right as subrogee was curtailed by the doctrine of contribution to a *pro rata* recovery. Brooks v. Matledge, 100 Ga. 367, 28 S. E. 119 (1897); *cf.* Ruthrauff v. Silver King Western Min. & Mill. Co., 95 Utah 279, 80 P. (2d) 338 (1938).

16. All persons who are interested in the premises, and would be prejudiced by a foreclosure, have a right to redeem; 2 JONES ON MORTGAGES (8th ed. 1928) § 1352. 3 POMEROY'S EQUITY JURISPRUDENCE § 1220, n. 1 lists these persons by classes. Their right to contribution after redemption from a mortgage is well established, *id.* § 1221, and should apply as well to redemption from a tax sale.

17. Where, as in the instant case, the mortgagor is insolvent and the equity of redemption is worth less than the mortgage debt, the mortgagee has suffered a real financial loss from the taking of his security and it would be inequitable to require him to risk additional loss by redeeming the property. Further, contribution arises out of the unjust enrichment of the defendants—here, the benefit of adding to the other mortgagees' security by satisfying the prior tax liens. RESTATEMENT, RESTITUTION (1937) § 1, comment *b.*

18. "The duty afterwards of contributing towards the payment on the ground of his being also a co-tenant with the mortgagor, is a burden on the land alone, not a personal

Should one of them exercise this privilege, there arise further problems, the solution of which will vary according to the law of different states, as to the payor's rights in his turn against those holding other interests in his parcel.[19]

Despite the rather complex incidental problems which thus arise where pieces of property instead of persons are the "parties," the fundamental principles of contribution remain, even in this situation, relatively simple. There is no requirement of any particular type of relationship, or of any special obligation beyond a common burden. The analogy of "impersonal co-sureties" does not affect the existing rules; it merely serves, by a comparison with a more familiar situation, to emphasize the identity of the principles involved. In the light of these considerations the instant case presents all necessary ingredients for contribution relief. The statute making the mortgagor's three pieces of property equally liable for county taxes, imposed on all three a common burden which was inofficiously discharged in full by one parcel. Under the "impersonal co-surety" analogy, settled contribution principles dictate the granting of *in rem* decrees for contribution from the other parcels. The fact that the court was unable to find in this situation sufficient "reciprocal rights and duties" to justify granting any relief, is an illustration of the dangers accruing from an approach which makes the abundance or scarcity of direct precedent, rather than the logical application of broad principles in new situations, the basis of decision.

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duty, and he must be left to exercise his own option as to whether he will pay the money and save his interest in the land, or refuse to pay and let his interest be foreclosed." Lyon v. Robbins, 45 Conn. 513, 525 (1878); 2 JONES ON MORTGAGES (8th ed. 1928) § 1393.

19. Between tenants in common there is the right of further contribution (note 8, *supra*). Between successive mortgagees, a first mortgagee discharging the claim is generally limited to adding it to his mortgage debt and recovering on foreclosure. See Comment (1935) 83 U. OF PA. L. REV. 780. Where a second mortgagee discharges the claim, in some states he is subrogated to its priority over the first mortgagee, (1934) 11 N. Y. U. L. Q. REV. 655; KY. STAT. ANN. (Carroll, 1936) § 4032; but in others he may be denied subrogation to such priority. *Cf.* Laventall v. Pomerantz, 263 N. Y. 110, 188 N. E. 271 (1933); (1934) 29 ILL. L. REV. 123.